

1422 No. 4388

1416

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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KARL EMERZIAN,

Plaintiff in Error,

vs.

S. J. KORNBLUM and WILLIAM KORNBLUM, a  
corporation,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District  
Court, for the Southern District of Cal-  
ifornia, Northern Division.

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FILED  
NOV 3 - 1924  
F. D. MONGYON  
CLERK



No.

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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys.**

For Plaintiff in Error:

GEO. COSGRAVE, Esq.,  
L. B. HAYHURST, Esq.,  
Mattei Building, Fresno, Calif.

For Defendant in Error:

LINDSAY & CONLEY, Esqs.,  
K. A. MILLER, Esq.,  
EDWARD SCHARY, Esq.,  
502 Mason Building, Fresno, Calif.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division.

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KARL EMERZIAN, : No. 152-Civil  
Plaintiff in Error, \*

vs. :

S. J. KORNBLUM and \* CITATION ON WRIT  
WILLIAM KORNBLUM, : OF ERROR  
a corporation, \*

Defendant in Error. :

\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*

UNITED STATES OF AMERICA – ss.

The President of the United States,

To S. J. Kornblum and William Kornblum, a corporation, and Messrs. Lindsay & Conley, Edward Schary and K. A. Miller,

Greeting:—

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco in the State of California, on the 7th day of August, 1924, pursuant to a writ of error on file in the clerk’s office of the District Court of the United States in and for the Southern District of California, Northern Division, in that certain action No. 152, Civil, wherein Karl Emerzian is plaintiff in error and you are defendant in error to show cause, if any there be,



why the judgment given, made and entered against the said Karl Emerzian in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

WITNESS Honorable WILLIAM P. JAMES, United States District Judge for the Southern District of California, and one of the judges of the District Court of the United States in and for the Southern District of California, Northern Division, this July 14, 1924, and the Independence of the United States, the 149th.

Wm P James  
United States District Judge for the  
Southern District of California.

[Endorsed]: Due service of the within Citation admitted and receipt of a copy acknowledged this July 15, 1924 Lindsay & Conley, K. A. Miller Edward Schary—Attorneys for Plaintiff No. 152—Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. CITATION ON WRIT OF ERROR FILED JUL 16 1924 CHAS. N. WILLIAMS, Clerk By L J. Cordes Deputy Clerk GEO. COSGRAVE MATTEI BLDG. FRESNO, CALIF. ATTORNEY-AT-LAW For defendant

IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
Northern Division.

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\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*

KARL EMERZIAN, : No. 152-Civil  
Plaintiff in Error, \*  
vs. : WRIT OF ERROR  
S. J. KORNBLUM and \*  
WILLIAM KORNBLUM, :  
a corporation, \*  
Defendant in Error. :

\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*

UNITED STATES OF AMERICA ) ss.

The President of the United States,

To the Honorable the Judge of the District Court  
of the United States for the Southern District of Cali-  
fornia, Northern Division, Greeting:—

Because in the record and proceedings as also in the  
rendition of the judgment of a plea which is in said  
District Court before you or some of you, between  
Karl Emerzian, plaintiff in error, and S. J. Kornblum  
and William Kornblum, a corporation, defendant in  
error, a manifest error hath happened to the great  
damage of said Karl Emerzian, plaintiff in error, as  
by his complaint appears,

We, being willing that error, if any hath been, shall  
be duly corrected and full and speedy justice done to  
the parties aforesaid in this behalf, do command you,  
if judgment be had therein, that then under your seal,

distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the City and County of San Francisco in the State of California, on the 6th day of August next, in the said Circuit Court of Appeals, to be then there held, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 14 day of July, 1924.

[Seal]

Chas. N. Williams

Clerk of the District Court of the United States,  
Southern District of California, Northern Division.

(Seal)

R S Zimmerman

Deputy

Writ allowed:

Wm P James

Judge

[Endorsed]: No. 152-Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. WRIT OF ERROR FILED JUL 14 1924 CHAS N. WIL-

LIAMS, Clerk By R S Zimmermann Deputy Clerk  
GEO. COSGRAVE Mattei Bldg. Fresno, Calif.  
ATTORNEY-AT-LAW for Defendant

-----  
IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA.  
NORTHERN DIVISION.

S. J. KORNBLUM and : No. 152 Civil  
WILLIAM KORNBLUM, :  
a corporation, :  
 :  
 : Plaintiffs, : AMENDED  
- vs - : COMPLAINT.  
KARL EMERZIAN, :  
 : Defendant. :  
----- :

By leave of Court first had and obtained, plaintiff files this its Amended Complaint, and for cause of action, alleges:

1.

That for all the times herein mentioned, the above said plaintiff was and still is a corporation duly organized and existing under and by virtue of the Laws of the State of New York;

11.

That for all the time herein mentioned, the said defendant was, and now is, a resident of the City of Fresno, County of Fresno, State of California; and that by reason of the diversity of the citizenship of the

plaintiff and defendant, this action was brought in the above said District Court of the United States;

111.

That on the 20th day of June, 1922, at and in the City of Fresno, County of Fresno, State of California, said plaintiffs and defendant entered into a certain written agreement for the sale and purchase of one hundred (100) cars of Muscat Grapes, a copy of which said agreement is hereto annexed, marked "Plaintiff's Exhibit A", and to which Exhibit reference is hereby made, and by such reference made a part hereof;

IV.

That in said agreement it is provided among other things that "on or about the 15th of August, if Seller elects from Buyer to give Seller an advance of Five or Ten (\$5,000.00 or \$10,000.00) Dollars, the Buyer agrees to do so"; that pursuant thereto, said Seller, the defendant herein, elected to receive an advance from the said Buyers, the plaintiffs herein, in the sum of Ten Thousand (\$10,000) Dollars, which said sum was, in pursuance of said agreement, paid by the said plaintiffs to the said defendant;

V.

That at the time of the execution of the agreement aforesaid, it was further understood and agreed by and between parties thereto that the grapes to be delivered pursuant to said Contract by the said defendant to the said plaintiffs were to be of the crop of 1922.

VI.

That thereafter since the execution of said agreement and at divers times prior to the commencement

of this action, said defendant delivered to said plaintiff forty-eight (48) cars of Muscat Grapes as per agreement, which said grapes were accepted and paid for by the said plaintiff at the said rate of Fifty (\$50.00) Dollars per ton, and pursuant to said agreement in full upon delivery;

## V11.

That the said defendant has failed, refused and neglected, and still does fail, refuse and neglect to further deliver to said plaintiff the balance of the one hundred (100) cars of Muscat Grapes, to-wit: fifty-two (52) cars or thereabout, but has sold and delivered the same and all thereof to other persons than these plaintiffs, without their consent, to plaintiff's damage in the sum of Twenty Six Thousand (\$26,000.00) Dollars.

## V111.

That no part of said sum of Ten Thousand (\$10,000.00) Dollars advanced to said defendant by the said plaintiffs has been repaid, save and except the sum of Four Thousand (\$4,000.00) Dollars, and that there is still due, owing and unpaid from the defendant to the plaintiff herein on account thereof the sum of Six Thousand (\$6,000.00) Dollars, which said sum said defendant has paid no part thereof to the plaintiffs, although demanded.

WHEREFORE, plaintiffs pray judgment against the said defendant for the sum of Thirty Two Thousand (\$32,000.00) Dollars, and for costs of suit herein.

Edward Schary

-----  
Attorney for Plaintiffs.

State of California :

SS.

County of Fresno :

EDWARD SCHARY, being duly sworn on behalf of the plaintiff in the above entitled action, says; that he has read the foregoing amended complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true; that the said plaintiff is absent from the County of Fresno, where his Attorney resides; and that the affiant is plaintiff's attorney, and therefore, makes this affidavit.

Edward Schary

-----  
Subscribed and sworn to before me this 23rd day of March, 1923.

[Seal] Blanche Walling

-----  
Notary Public in and for said  
County and State.

PLAINTIFF'S EXHIBIT "A".

For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned agree to the following:

Witnesseth:—

That Karl Emerzian, party of the first party of the first part agrees to sell, and S. J. and William Kornblum, parties of the second part, agree to buy One hun-

dred cars of Muscat Grapes at Fifty dollars per ton, loaded, including lugs, in Refrigerator cars.

Same Fruit must be free of rain damage and suitable for Eastern shipment.

Shipment to begin when Fruit is well matured.

If Buyer insists on covered lugs, he must pay the expense of same.

Fruit is to be paid for on loading of cars and surrender of Bill of Lading in Fresno.

On or about the fifteenth of August if Seller elects from Buyer to give seller an advance of Five or Ten Thousand Dollars, the Buyer agrees to do so.

In the event of Strikes or car shortage beyond the Sellers control, Seller is not responsible for delivery.

S. J. & Wm. Kornblum

By S. J. Kornblum

Peter Maljan

-----

Karl Emerzian

Witness

-----

S. J. & Wm. Kornblum

-----

I, S.J.K. agree to pay Peter Maljan the sum of Six Hundred and twenty five as brokerage in

S.J.K.

On this Twelfth day of June, 1922.

Fresno, California.

[Endorsed]: 152 Civ. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALI-



FORNIA. S. J. KORNBLUM & WM. KORNBLUM a corporation, Plaintiffs, - vs - KARL EMERZIAN, Defendant. AMENDED COMPLAINT. FILED MAR 26 1923 CHAS. N. WILLIAMS, Clerk, By W. J. Tufts Deputy. EDWARD SCHARY ATTORNEY-AT-LAW 502 Mason Building Fresno, California

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

— . . . . . — X

S. J. KORNBLUM and : No. 152 Civil  
WILLIAM KORNBLUM, :  
a corporation, : ANSWER TO  
Plaintiffs, : AMENDED COM-  
vs. : PLAIN, COUNTER-  
KARL EMERZIAN, : CLAIM AND CROSS-  
Defendant. : COMPLAINT.

— . . . . . — X

Comes now defendant and answering plaintiff's amended complaint herein, for answer thereto,

— I —

Admits that, as alleged in Paragraph IV of said amended complaint, plaintiff advanced to defendant the sum of \$10,000 but alleges in that behalf that only a portion of said amount, to-wit: the sum of approximately \$7,000, was applied to the purchase of grapes described in plaintiff's said complaint, but that by

agreement entered into between plaintiff and defendant, the sum of \$3,000 was applied to the purchase of a certain 14 cars of grapes referred to in defendant's cross-complaint hereinafter set forth.

—II—

Denies, as alleged in Paragraph VII of said complaint, that defendant has failed, refused or neglected or does still fail, refuse or neglect to deliver to plaintiff the balance of 100 cars of Muscat grapes, being 52 cars, or any number of cars of grapes.

—III—

Admits that defendant sold and delivered a portion thereof, being approximately 7 cars to persons other than this plaintiff, but denies that the same was without the consent of plaintiff, but on the contrary alleges that the same was done because of the refusal of plaintiff to receive any of said cars other than the said 48 cars above described and defendant alleges that the remainder of said crop of grapes, being approximately 25 cars, were not sold but, because of plaintiff's failure and refusal to receive and accept the same, became and were entirely destroyed and were a total loss to defendant.

—IV—

Denies that by reason of the facts set forth in Paragraph VII of said complaint or for any reason or from any acts of defendant, plaintiff has suffered damage in the sum of \$26,000.00 or any other sum of money at all.

—V—

Denies that there is still due, owing or unpaid from defendant to plaintiff on account of the contract set

forth in plaintiff's complaint or on any other account, the sum of \$6,000 or any sum at all.

And further answering plaintiff's amended complaint and by way of counter-claim against plaintiff, defendant alleges:

—I—

That on or about June 12, 1922, plaintiff and defendant made and entered into the contract described in plaintiff's complaint and set forth as "Exhibit A" attached thereto.

—II—

That pursuant to the terms of said contract, defendant delivered to plaintiff 48 cars of grapes and thereupon plaintiff and defendant executed a written modification of said contract whereby plaintiff agreed to accept in full performance of the terms of said contract on the part of defendant the entire product of the Minkler Ranch, the same to be not less than 15 cars of grapes.

That the Minkler Ranch described in said modification of said contract was owned by defendant and bore at said time the crop of Muscat grapes which were the grapes described in said original contract.

That at all times after the making of said original contract and after the execution of the said modification of the same hereinbefore described, defendant has been able, ready and willing to deliver all of the grapes therein described and of the kind and quality therein specified and prior to the commencement of this action defendant duly tendered and offered to deliver to plaintiff the said cars of grapes and the bills

of lading for the same but plaintiff at all times refused and does still refuse to accept the same from this defendant or to pay to defendant the amount due therefor.

—III—

That after the said modification of said original contract hereinbefore described, defendant loaded in refrigerator cars and consigned to plaintiff approximately seven car of grapes, all of the kind and quality described in said contract, and tendered to plaintiff the bills of lading therefor and offered to deliver the same to plaintiff on receipt of the amount of the purchase price thereof, but plaintiff thereupon refused to accept the said bills of lading and then and there advised defendant that it would not accept the same and would not accept any further of the grapes mentioned and described in the said contract and the said modification thereof.

—IV—

That at the time of the refusal of plaintiff so to receive and accept said bills of lading and at the time that plaintiff so notified defendant that it would not receive any more of said grapes, approximately 300 tons of grapes were on the said Minkler Ranch and by reason of the failure and refusal of plaintiff so to accept and pay for the cars of grapes hereinbefore described and to accept the grapes that were then on the said Minkler Ranch and included in said contract and modification thereof, defendant has suffered damage in the sum of \$19,022.26, no part of which has been paid, save and except the sum of \$2,100.00, and there is unpaid from plaintiff to defendant on account thereof the sum of \$16,922.26.

And by way of cross-complaint against plaintiff, defendant alleges:

—I—

That plaintiff is now and at all times herein mentioned has been a corporation organized and existing under the laws of the State of New York.

—II—

That during the month of October, 1922, defendant and plaintiff entered into an agreement whereby defendant agreed to sell and deliver to plaintiff and plaintiff agreed to purchase and accept from defendant 3 cars of Alicante Bouchet grapes, 2 cars of Mission grapes, 7 cars of Zinfandel grapes and 3 cars of Muscat grapes, each car containing 15 tons, and agreed to pay therefor \$180.00 per ton for Alicante Bouchet grapes, \$150.00 per ton for Mission grapes, \$130.00 per ton for Zinfandel grapes and \$80.00 per ton for Muscat grapes, upon delivery thereof, the said prices to be \$5.00 less per ton in the event the market had lowered at the time of delivery, and plaintiff then and there paid to defendant, as part of the purchase price of said grapes, the sum of \$3,000.00.

—III—

That thereafter, by agreement entered into between plaintiff and defendant, plaintiff agreed to accept one car of Pettit Bouchet grapes in the place and stead of 2 of the 3 cars of Alicante Bouchet grapes mentioned in said contract and defendant thereupon tendered to plaintiff bills of lading covering 1 car of Alicante Bouchet grapes originally described in said contract and 1 car of Pettit Bouchet grapes described in the modi-

fication thereof and offered to deliver the same to plaintiff on payment of the purchase price thereof, but plaintiff thereupon refused to accept the same and then and there notified defendant that he would not accept, receive or pay for any of the grapes so agreed to be sold by defendant to plaintiff, as hereinbefore described.

—IV—

Defendant has duly performed all of the terms, conditions and covenants of said agreement on his part agreed to be performed and duly tendered and offered to deliver the said grapes to the plaintiff but plaintiff notified defendant that he would refuse to accept the same as hereinbefore alleged.

—V—

That by reason of the failure and refusal of plaintiff so to receive, accept and pay for said grapes, as hereinbefore described, defendant has suffered damage in the sum of \$22,472.12, no part of which has been paid to plaintiff save and except the sum of \$3,000.00 received by plaintiff on the making of said contract, as aforesaid, and there is now unpaid from plaintiff to defendant the sum of \$19,472.12.

WHEREFORE, defendant prays that plaintiff take nothing by its said complaint; that defendant have judgment against plaintiff for the sum of \$16,922.26 on his counter-claim, and the further sum of \$19,472.12 on his cross-complaint, making a total of \$36,394.38, together with interest on the same from and after the commencement of this action at the legal rate, and costs of suit.

Geo. Cosgrave  
Attorney for Defendant



IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION.

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|                    |   |               |
|--------------------|---|---------------|
| S. J. KORNBLUM and | : | No. 152 Civil |
| WILLIAM KORNBLUM.  | : |               |
| a co-partnership,  | : | ANSWER TO     |
| Plaintiffs,        | : | COUNTERCLAIM  |
| - vs -             | : | AND CROSS-    |
| KARL EMERZIAN,     | : | COMPLAINT.    |
| Defendant.         | : | _____         |
| -----              | : |               |

Comes now the plaintiff above named, answers defendant's Counter-Claim herein, admits, denies and alleges as follows:

1.

Admits all of Paragraph 1 of defendant's Counter-claim, to-wit: that on or about June 12, 1922, plaintiff and defendant made and entered into the contract described in plaintiff's Complaint and set forth as "Exhibit A" therein;

11.

Admits that pursuant to the terms of said Contract defendant delivered to plaintiff forty-eight (48) cars of grapes, but denies that thereupon plaintiff and defendant executed a written modification of said contract whereby plaintiff agreed to accept in full performance of the terms of said contract on the part of defendant the entire product of the Minkler Ranch,



the same to be not less than fifteen (15) cars of grapes. And in this connection, plaintiff alleges that on or about the 18th day of October, 1922 at which time said defendant had previously delivered to the plaintiff forty-five (45) cars of grapes pursuant to the terms of the contract marked "Exhibit A" in plaintiff's Complaint; and that upon the delivery of said numbers of cars as aforesaid, said defendant threatened said plaintiff that he the said defendant would deliver no further cars pursuant to the said contract, but that the said plaintiff then and there demanded and procured a writing from the said defendant to the effect that he the said defendant would further deliver to the said plaintiff at least fifteen (15) additional cars of grapes from a certain Minkler Ranch Camp Five purportedly the property owned by the said defendant; that at the time that said writing was made the same was not intended to in any way change, modify or abridge the written agreement heretofore mentioned, but was merely intended as a further assurance of good faith on the part of both parties for the fulfillment of the contract originally entered into;

## 111.

Denies that all times after the making of said original contract and/or after the execution of the modification of the same, defendant has been able, ready and/or willing to deliver all or any of the grapes therein described and of the kind and quality therein specified; and denies that prior to the commencement of this action, or at any other time, or at all, defend-

ant duly tendered and offered to deliver to the plaintiff the said cars of grapes and the bills of lading for the same; and denies that plaintiff at all times refused and does still refuse to accept the same from this defendant or to pay to defendant the amount due therefor. And in this connection alleges: that said defendant did offer to deliver certain grapes to the said plaintiff herein after a long period of refusal and that when said grapes were offered to the said plaintiff, the same were greatly damaged and inferior in quality and not fit for Eastern shipment as provided in said contract;

## 1V.

Denies that after the said modification of said original contract, or at any other time, or at all, defendant loaded in refrigerator cars and consigned to plaintiff approximately seven (7) cars of grapes, all of the kind and quality described in said contract, and tendered to plaintiff the bills of lading therefor, and offered to deliver the same to plaintiff on receipt of the amount of the purchase price therefor;

## V.

Admits that plaintiff refused to accept the bills of lading tendered by the said defendant after said date of October 18, 1922, and advised said defendant that it would not accept the same, and would not accept any further of the grapes mentioned in said bills of lading for the reason that the same were not the grapes described in the said contract or the modification thereof;

## VI.

Denies that at the time of the refusal of plaintiff so to receive and accept said bills of lading and at the

time that the plaintiff so notified defendant that it would not receive any more of said grapes, or at any other time, or at all, approximately three hundred (300) tons of grapes were on the said Minkler Ranch; and denies that by reason of the failure and refusal of plaintiff so to accept and pay for the cars of grapes hereinbefore described and to accept the grapes that were on the Minkler Ranch and included in said contract and modification thereof, defendant has suffered damage in the sum of Nineteen Thousand and Twenty-two and 26/100 (\$19,022.26) Dollars, or any other sum, or at all; and denies that the said plaintiff has paid to the said defendant the sum of Twenty-one Hundred (\$2100.00) Dollars on account thereof, or any other sum, or at all.

\*\*\*\*\*

By way of answer to defendant's Cross Complaint, plaintiff alleges:

1.

Admits that as alleged in Paragraph 1 of said Cross Complaint said plaintiff is now, and at all times herein mentioned has been a corporation duly organized and existing under the laws of the State of New York;

11.

Denies that during the month of October, 1922, or at any other time, or at all, defendant and plaintiff entered into an agreement whereby defendant agreed to sell and deliver to plaintiff, and plaintiff agreed to purchase and accept from defendant three (3) cars of Alicante Bouchet Grapes, two (2) cars of Mission Grapes, seven (7) cars of Zinfandel Grapes and three

(3) cars of Muscat Grapes, or any other kind or character of grapes, which cars contained fifteen (15) tons, or any other quantity, and agreed to pay therefor One Hundred and Eighty (\$180.00) Dollars per ton for Alicante Bouchet Grapes, One Hundred and Fifty (\$150.00) Dollars per ton for Mission Grapes, One Hundred and Thirty (\$130.00) Dollars per ton for Zinfandel Grapes, and Eighty (\$80.00) Dollars per ton for Muscat Grapes, or any other price, or at all, upon delivery thereof, or at any other time, and/or the said prices to be five (\$5.00) Dollars less per ton in the event the market had lowered at the time of delivery; and denies that plaintiff then and there paid to defendant as part of the purchase price of said grapes the sum of Three Thousand (\$3,000.00) Dollars, or any other sum, or at all;

111.

Denies that as alleged in Paragraph 3 of defendant's Cross Complaint that thereafter, or at any time, or at all, by agreement entered into between plaintiff and defendant, plaintiff agreed to accept one (1) car of Pettit Bouchet Grapes in the place and stead of two (2) of the three (3) cars of Alicante Bouchet Grapes mentioned in said contract; and denies that defendant thereupon tendered to plaintiff bills covering one (1) car of Alicante Bouchet Grapes originally described in said contract and one (1) car of Pettit Bouchet Grapes described in the modification thereof and/or offered to deliver the same to the plaintiff on payment of the purchase price thereof; and denies that plaintiff thereupon refused to accept the same and/or then and

there notified defendant that he would not accept, receive or pay for any of the grapes so agreed to be sold by defendant to plaintiff as hereinbefore described;

1V.

Denies that defendant has duly performed all or any of the terms, conditions and covenants of said agreement on his part agreed to be performed and/or duly tendered and offered to deliver the said grapes to the plaintiff and/or that plaintiff notified defendant that he would refuse to accept the same as hereinbefore alleged;

V.

Denies that by reason of the failure and refusal of the plaintiff so to receive, accept and pay for said grapes as hereinbefore described, defendant has suffered damage in the sum of Twenty-two Thousand Four Hundred and Seventy-two and 12/100 (\$22,472.12) Dollars, or any other sum, or at all; and denies that plaintiff has paid to the said defendant the sum of Three Thousand (\$3,000.00) Dollars on account thereof, or any other sum, or at all.

WHEREFORE, plaintiff prays that defendant take nothing by reason of his Counterclaim and Cross Complaint herein, and that plaintiff have judgment as prayed for in its Complaint.

Edward Schary

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Attorney for Plaintiff.

STATE OF CALIFORNIA :

SS.

COUNTY OF FRESNO :

S. J. KORNBLUM, being first duly sworn on behalf of the plaintiff corporation in the above entitled action, says; that he is the President of said Corporation; that he has read the foregoing Answer to Counterclaim and Cross Complaint and knows the contents thereof; that the same is true of his own knowledge except as to such matters therein stated on information and belief, and as to such matters, he believes it to be true.

Samuel J. Kornblum

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Subscribed and sworn to before me  
this 16 day of May, 1923.

Edward Schary [Seal]

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Notary Public in and for said  
County and State.

[Endorsed]: 152 Civ. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION. S. J. KORNBLUM, et al, etc., Plaintiff - vs - KARL EMERZIAN, ANSWER TO Counter-Claim and Cross-Complaint Due service of the within, by copy, admitted this 17th day of May 1923 reserving all legal exceptions G Cosgrave Atty for Defendant. FILED MAY 18 1923 CHAS. N. WILLIAMS, Clerk By W. J. Tufts Deputy EDWARD SCHARY ATTORNEY-AT-LAW 502 Mason Building Fresno, California

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

S. J. and )  
WILLIAM KORNBLUM, )  
a corporation, )  
Plaintiff, ) Civil No. 152  
- vs - )  
KARL EMERZIAN, )  
Defendant, )

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 28th day of January, 1924, before the court without a jury, a jury trial having been duly waived by the parties, and Edward Schary, Esquire, Messrs. Lindsay & Conley, and K. A. Miller, Esquire, appearing as attorneys for the plaintiff, and George Cosgrave, Esquire, and L. B. Hayhurst, Esquire, appearing as attorneys for the defendant, and from the evidence introduced the Court finds the facts as follows, to-wit:

1. That all of the allegations contained in Paragraphs I, II, III and V of plaintiff's complaint are true:
2. That pursuant to the terms of their written agreement, a true copy of which is attached to the complaint and marked plaintiff's Exhibit "A", the defendant elected to receive an advance from the said plaintiff of the sum of Ten Thousand Dollars, (\$10,000.00), which said sum was paid by said plaintiff to the said defendant; that no part of said sum of \$10,-

000.00 advanced to said defendant by the said plaintiff has been repaid, save and except the sum of \$4,800.00, and there is still due, owing and unpaid from the defendant to the plaintiff herein, on account thereof, the sum of \$5,200.00, which said sum has not been repaid to the plaintiff, or any part thereof, although plaintiff demanded the payment of the same before the commencement of this action.

3. That in accordance with the terms of said written agreement, said defendant delivered to the plaintiff 48 cars of Muscat grapes, which said cars were accepted and paid for in full by the plaintiff upon the delivery thereof;

4. That the said cars of grapes so delivered averaged fifteen tons, or 30,000 pounds each;

5. That defendant has failed, neglected and refused to deliver to the plaintiff the balance of the 100 cars of Muscat grapes provided to be delivered to the plaintiff by the defendant under the terms of the agreement - to-wit, 52 cars;

6. That by reason of defendant's failure and refusal to deliver said 52 cars of Muscat grapes, plaintiff has been damaged in the sum of \$13,260.00, and in addition thereto in the further sum of \$5,200.00, which said sum was and is the unapplied portion of the deposit remaining in the hands of the defendant, together with interest thereon at the rate of seven per cent per annum from the 23rd day of October, 1922, to date;

7. That it is not true that the defendant at any time or at all ever offered or tendered to the plaintiff any car or cars of Muscat grapes of the kind and



quality specified in said agreement, or the bills of lading therefor, which plaintiff refused to accept or pay for. On the contrary the court finds that the plaintiff accepted and paid for, as required by the agreement, each and every car of Muscat grapes of the kind and quality specified in the agreement that was tendered to the plaintiff by the defendant.

8. That plaintiff has fully kept and performed all of the terms, covenants and conditions of said agreement that were under the terms of the agreement to be kept and performed by the plaintiff;

9. That it is true that during the latter part of October and the first part of November, 1922, the defendant tendered to the plaintiff seven cars of Muscat grapes which plaintiff refused to accept, but in this connection the Court finds that the grapes so tendered were rain damaged, in a decayed condition, and unsuitable and unfit for Eastern shipment;

10. That at the time of the refusal of said plaintiff to accept said seven cars of Muscat grapes and at all times thereafter during the season of 1922, the defendant was unable to tender or deliver to the plaintiff any Muscat grapes in car load lots that were free from rain damage and fit and suitable for Eastern shipment;

11. That it is not true that plaintiff and defendant executed a written modification of their contract whereby plaintiff agreed to accept, in full performance of the terms of said agreement on the part of the defendant, the entire product of the Minkler Ranch, the same to be not less than fifteen cars of grapes;

12. That all of the allegations of paragraph IV of defendant's further answer and counter-claim are untrue;

13. That all of the allegations of paragraphs II, III, IV and V of defendant's cross-complaint are untrue.

As conclusions of law from the foregoing facts, the Court finds that plaintiff is entitled to recover damages from the defendant in the sum of \$13,260.00, and in addition thereto the sum of \$5,200.00, the balance of the deposit now in the hands of the defendant, together with interest on said sum of \$5,200.00, and on said sum of 13,260, at the rate of seven per cent per annum, from October 22, 1922, to date, and costs of suit.

That defendant is not entitled to recover anything by reason of his counter-claim and cross-complaint.

Let judgment be entered accordingly.

Wm P James

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Judge of said District Court

[Endorsed]: Due Service of the Within Findings of Fact and Conclusions of Law admitted and receipt of a copy acknowledged this 1st day of May, 1924. G Cosgrave L. B. Hayhurst Attorneys for Defendant Civil No. 152 IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION S. J. and WILLIAM KORNBLUM, a corporation, Plaintiff, - vs - KARL EMERZIAN, Defendant. FINDINGS OF FACT AND CONCLU-

SIONS OF LAW FILED MAY 5 1924 CHAS.  
N. WILLIAMS, Clerk Murray E Wire Deputy

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IN THE DISTRICT COURT OF THE UNITED  
STATES, SOUTHERN DISTRICT OF CALI-  
FORNIA, NORTHERN DIVISION.

S. J. and WILLIAM )  
KORNBLUM, ) Civil No. 152  
a corporation, )  
Plaintiff, ) JUDGMENT  
- vs - )  
KARL EMERZIAN, )  
Defendant )

This cause coming on regularly for trial on the 28th day of January, 1924, before the Court sitting without a jury, a jury trial having been waived by the parties, and Edward Schary, Esquire, Messrs. Lindsay & Conley, and K. A. Miller, Esquire, appearing as attorneys for the plaintiff, and George Cosgrave, Esquire and L. B. Hayhurst, Esquire, appearing as attorneys for defendant; whereupon witnesses upon the part of the plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed, the cause was submitted to the Court for consideration, and after due deliberation thereon the Court finds its findings and decision in writing, and orders that judgment be entered herein in favor of the plaintiff, in accordance therewith

WHEREFORE, by reason of the law and findings aforesaid, IT IS ORDERED, ADJUDGED AND DECREED that S. J and William Kornblum a corporation, the plaintiff, do have and recover of and from Karl Emerzian, the defendant, the sum of Eighteen Thousand Four Hundred Sixty Dollars (\$18,460.00), with interest on the sum of \$5,200.00 and on said sum of \$13260. from October 22, 1922, to date hereof amounting to \$20,445/00, together with plaintiff's costs and disbursements incurred in this action amounting to the sum of \$109.35.

Dated: May 5th, 1924

Judgment entered May 5—1924 Chas. N. Williams,  
Clerk By Murray E Wire, Deputy

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Judge of said Court

[Endorsed]: Civil No. 152 IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION S J and WILLIAM KORNBLUM, a corporation, Plaintiff, - vs - KARL EMERZIAN, Defendant. JUDGMENT FILED MAY 5 1924 CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy

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been returned, according to the allegations of Paragraph VIII, except the sum of \$4000. He further alleges the failure on the part of the defendant to deliver more than 48 cars of grapes, and asks for damages for that failure in the sum of \$26,000. Our understanding is that he is seeking a recovery of the amount unpaid on the theory of a rescission of the contract. I think that is plain. He is also seeking damages, standing upon the terms of the contract. We understand that that position cannot be maintained, and we therefore move at this time, if your Honor please, that the plaintiff be required to elect as to what he is going to base his contention in this case on, whether upon a rescission of the contract and return of the amount of money not repaid or on the element of damages, which calls for a sustaining of the contract on the theory that it is still in force. I understand that the authorities upon that proposition are practically uniform and undisputed. One of the latest cases is that of *Lindley v. Berry*, cited in 181 Cal. at page 1.

MR. CONLEY: If the Court please, in response to that, we are standing on the contract. It is set up in one count, and that is an element of damages that has been pleaded and the deposit was given to carry out the terms of the contract. *Lindley v. Berry* has no application to a case of this kind. The Court will remember, probably, that that case is where they brought suit for damages on account of a breach of a contract and

(Testimony of Karl Emerzian.)

put in a second count for a rescission of the contract, and the Supreme Court of this State held that they must elect as between the two. And that has been thoroughly threshed out in the Superior Courts here. I believe I am the first one that raised it and succeeded in getting an instructed verdict in the case. My opinion is that it has no application to a case of this kind. We are not asking to rescind. We are standing on the terms of the contract.

THE COURT: I think the money advanced, as it was pleaded, would be a part of the damage, would it not?—that the money advanced would be a part of the damage. The motion is denied, Mr. Cosgrave.

#### KARL EMERZIAN

the defendant, sworn as a witness for plaintiff, pursuant to the provisions of Section 2055 of the Code of Civil Procedure of the State of California, testified as follows:

#### Direct Examination

The contract entered into between plaintiff and defendant, being Plaintiff's Exhibit 1, in words and figures as follows:

For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned agree to the following:

Witnesseth:

That Karl Emerzian, party of the first *party of*

(Testimony of Karl Emerzian.)

*the first* part agrees to *seel*, and S. J. and William Kornblum, parties of the second part, agrees to buy One hundred cars of Muscat Grapes at Fifty dollars per ton, loaded, including lugs, in Refrigerator cars.

Same fruit must be free of rain damage and suitable for Eastern shipment.

Shipment to begin when Fruit is well matured.

if Buyer insists on covered lugs, he must pay the expense of same.

Fruit is to be paid for on loading of cars and surrender of Bill of Lading in Fresno.

On or about the fifteenth of August if Seller elects from Buyer to give seller an advance of Five or Ten Thousand Dollars, the Buyer agrees to do so.

In the event of Strikes or Car shortage beyond the Sellers control, Seller is not responsible for delivery.

S. J. & Wm. Kornblum

By S. J. Kornblum

Karl Emerzian

Peter Maljan

Witness

S. J. & Wm. Kornblum

I, S. J. K. agree to pay Peter Maljan the sum Six Hundred and twenty five as *brokerage* in

S. J. K.

On this Twelfth day of June, 1922  
Fresno, California.



(Testimony of Karl Emerzian.)

was here introduced on behalf of plaintiff. The witness then testified as follows:

I reside in Fresno and my business is farming. I am engaged in selling grapes in this community. I am acquainted with Mr. Kornblum, plaintiff, and entered into this contract with him in the year 1922. Under that contract I delivered 48 cars and delivered more black grapes and offered him 4 or 5 cars of Muscat grapes and he refused to take them. I tendered him 8 bills of lading all together, 4 black grapes and 4 Muscat grapes. The first time he refused to accept them was October 26th. The grapes were good grapes. They were merchantable in the cars and suitable for Eastern shipment and had not been damaged by rain. They had not been rained on at all that I know of. There was very little rain, a small shower. They were in first-class condition. The general understanding of the term "suitable for Eastern shipment" in this community is grapes not spoiled or mildewed, soft and leaky. If they are not, they are good, merchantable grapes. If the grapes leak, they are not fit for shipment to the Eastern market. The first rain in 1922 came in September, I think. We had a little shower. We had no big storm that year. We did have a storm in Fresno but not down there. The grapes were not exposed to the shower that fall upon my place. They got wet a little but it didn't damage them.

I tendered the bills of lading to Kornblum at the Sequoia Hotel and don't know whether he made an examination of the grapes or not. He didn't tell me he

(Testimony of Karl Emerzian.)

had. I told him in September that I didn't expect him to take certain grapes because I picked those grapes and we couldn't get a car for three, four or five days and I told Mr. Kornblum I wasn't going to ship these grapes to him, I says, because it isn't fit and I put them in the Sanger Winery for grape juice. I didn't tell him that in October. Kornblum never told me he had examined the grapes and that they were rotten or unfit for Eastern shipment. I had two cars and went and offered them to him and he refused to take them. He says "The market is going to pieces and I am not going to take them." That statement was made right in front of the Sequoia Hotel. I was with Mr. Peter Maljan, who was my agent. I offered the other two cars as soon as I got the cars. I offered him on the 25th and 26th and a day after he says "I will take this car but I am not going to pay you for it." The car amounted to \$870 and he didn't pay me anything for that car. He says, "You owe me some money." He didn't tell me the grapes were rotten, never said a word about that. The actual or reasonable market value of Muscat grapes on October 26, 1922 went down to almost nothing—you can't give them away. The market value was just as bad on October 25th.

EXCEPTION NO. 1

Q The 1st to the 10th day of October, what was the reasonable market value of Muscat grapes delivered here in refrigerator cars in Fresno, or I will make it the San Joaquin Valley, at that time?

A From \$60 to \$75.

(Testimony of Karl Emerzian.)

Q What were they worth from the 10th day of October until the 20th?

MR. COSGRAVE: We object to that, if the Court please, as being immaterial, at least at this stage of the case. There has been no breach shown at the present time, at least prior to October 26th, and therefore the price of Muscat grapes at a time prior to that is immaterial at this stage of the evidence.

THE COURT: It might be some evidence leading up to it, showing his general familiarity with the market. It might be some evidence.

Exception.

Q BY MR. CONLEY: . . . What was the market value between the 10th and the 20th of October?

A From \$60 to \$75 a ton.

The Witness continuing: Muscat grapes were worth on the market on the 21st day of October and the 22nd day of October, 1922 from \$70.00 to \$75.00 per ton. The market went off on the 23d and you couldn't give them away. As soon as I had cars I offered them to him. I offered him the 25th and 26th. During September the grapes were worth one day \$60 and another day \$65 and \$70 and various things. The highest market value during the month of September was \$60 to \$85 and \$75. They were selling on the market for \$75 a ton and more and less.

I didn't deliver the 52 cars to Mr. Kornblum because he refused to take it. His first refusal was on the 25th

(Testimony of Karl Emerzian.)

and 26th of October. I didn't deliver the 100 cars before the 25th of October because I delivered as fast as I got cars. I had grapes on other ranches and sold 8 cars besides those to Kornblum. He refused to take 8 or 10 cars after the 25th. I tendered him bills of lading after the 26th right in the Sequoia Hotel. Pete Maljan was there a couple of times. Kornblum says, "Emerzian, you have been giving me chocolate candy, now you are handing me poison and I am not going to take it." After October 26th I tendered him a bill of lading on November 2nd, one on the 11th of November and on the 8th and on November 4th. He says, "I told you a hundred times I am not going to take any more grapes." I filled another car on the 3d and gave it to him on the 4th.

Q Why did you, after he told you on the 26th day of October that he wasn't going to take any more cars, persist in tendering him a half a dozen cars after that? Why did you persist in doing it?

A Because he wanted those cars, and I wanted to give them to him.

I never insisted upon a modification of that contract. He wanted a new contract written, not me. I went up there to collect some money for the bills of lading and he says, "Now, I want you to tell me, Emerzian, how many more cars of Muscats you are going to give me." I says, "I am going to give you all I can load, if I get 10 cars tomorrow, you will get them, if I get one next day, you will get it." He says "Can you give me 15 cars sure?" I says I didn't know for sure but I will

(Testimony of Karl Emerzian.)

give you all I can get. "Well," he says, "I am going to write a contract." "Well" I says, "I don't need no contract, you have got one contract that is just as good as any of them." He says "I want to be sure how many cars I am going to get from now on." "Well" I says, "Mr. Kornblum, I agree to give you 100 cars and I will give them to you as fast as I can get them." "No," he says, "I want to know exactly how many you can give me in the next fifteen days." I says, "If I can, yes. If I can get cars, I will." He says "I am going to write you a contract" and I says "I don't need it but if you want it I don't care." So he sat down to the table and wrote a contract and he signs it. "Well" I says "what is that, let me read it," and I read it and I says "that is the same thing as the other one, I am going to give you all I can get." He says "If you give me 15 cars I am satisfied." I says "No, I kept four or five hundred tons of grapes on the ranch and as soon as I can get cars I will put them in the cars." He says "That is all right, if there is more I will take them."

I happened to go in Mr. Kornblum's room in the Sequoia Hotel because I went up there to collect some money. I never had any trouble getting any money from Mr. Kornblum. I didn't lock the door and I didn't ask Kornblum to lock the door. The door was not locked I am certain about that. I didn't tell Mr. Kornblum that I was not going to give him any more grapes. Mr. Kornblum did not say to me substantially, "Why, Mr. Emerzian, we entered into that contract, I

(Testimony of S. J. Kornblum.)

advanced to you \$10,000 when grapes were worth only \$42.50 a ton. I showed you that I was a man that intended to keep my contract or I wouldn't have made the deposit and now I find out that you are going to welch upon your contract. Why do you do this?" He asked me if I would give him 15 after this. He never asked if I could give him at least 75 cars. I didn't say he was in good luck if I would give him 15 cars but that I would give him 15 cars. The contract was at his own suggestion and his own writing. He asked me for 15 cars. He wrote the contract saying 15 cars and I made him change it and I said about 15 cars and all I can give you. Kornblum never threatened me with any lawsuit at that time. The subject was never mentioned. On the 23d he began to refuse the grapes and I gave him the cars on the 26th and he took one. I never had any trouble getting my money from Mr. Kornblum. He paid me every time I presented the bill of lading to him. Up to the 18th day of October Kornblum never refused to take any bill of lading of any car of Muscat grapes that I tendered him. He took the bills upon presentation and paid for the grapes. He paid me \$50.00 per ton when grapes were worth on the market \$42.50 per ton just as he agreed to.

### S. J. KORNBLUM

sworn as a witness for plaintiff, testified as follows:

My name is Samuel J. Kornblum, I reside in Brooklyn, N. Y. and am fruit dealer and grower as well. I am growing fruit in California and have some acreage

(Testimony of S. J. Kornblum.)

in Imperial Valley and some here in Fresno and in Modesto. I am thoroughly familiar with the grape business for thirty years or more and make a specialty of selling grapes in the East.

I never did any business with defendant until 1920 when I entered into the contract that has been admitted in evidence here with Mr. Emerzian. There were 45 cars delivered. I demanded grapes every night he came to the lobby of the Sequoia Hotel. I asked him the reason why he didn't give me any grapes that I bought. He says "I can't obtain no cars." I says "Why you can get cars to load other stuff?" "Well" he says "I can get \$35 or \$40 a ton more and I can give you your grapes any time. We have no contract as to dates when I have to give you the grapes." After the delivery of the 45 carloads, I had conversations with him about a dozen times. I said "Now that they are high, you seem to utilize the cars for other grapes and give them to some other people." He says, "I have got a contract with you and there is no date when I am to give them to you and it is up to me whenever I see fit I will give them to you."

#### EXCEPTION NO. 2

Q. Mr. Kornblum, you have been sitting here listening to the testimony of Mr. Emerzian. I don't want to ask you any question about it, but I want you to tell this court what took place in your room upstairs and what led up to it and all that occurred there.

MR. COSGRAVE: If the Court please, it seems to me that that evidence is not material.

(Testimony of S. J. Kornblum.)

Evidently there is enough before the court to show that there has been a written agreement signed between these parties. What led up to that I should think is entirely immaterial. There is nothing in the pleading to warrant the conclusion that it was the result of coercion or anything of that sort. There is no claim made of that kind. Therefore it supersedes whatever written agreement there was before, and also the oral negotiations of the parties.

THE COURT: I suppose anything that occurred between the parties by way of a dispute or a claim for failure and a denial of delivery, and all of those things, must be ventilated here in order to get at the facts of this controversy. Grapes are admitted not to have been delivered in full performance of the contract, and the question is why, and I suppose the only way to get at it is to find out what happened between them during that time.

MR. COSGRAVE: We make the specific objection on the further ground that it appears from the evidence in this case that the negotiations the witness is about to describe resulted in a new contract.

MR. CONLEY: We might call the Court's attention to the fact that it is alleged right in Paragraph VII of the complaint. We have alleged they failed, refused, and neglected to deliver the other 52 cars, and we want to show why this was done.



(Testimony of S. J. Kornblum.)

THE COURT: Objection overruled.

Q. BY MR. CONLEY: Mr. Kornblum, take your time and state all that you remember that occurred up in that room and how you happened to go up there, and all about it.

A I remember it was on the 18th day of October; in fact I remember it was that date because I see the paper was written on the 18th of October. I came in that night into the lobby and he said, "I got to talk to you and we better come upstairs to your room." And I did go up with him, and I came in. We were both in the room and he said, "You'd better lock that door. I don't want no interference. Somebody may come in." I says, "What is it all about?" So he said to me, "You know you are not going to get 100 cars of grapes"—100 cars of Muscats." I says, "I didn't know that Mr. Emerzian. That is the first time, your telling me." I says, "Why ain't I going to get 100 cars of grapes?" "Well," he says, "In the first place you overloaded these cars. You loaded so many more in these cars than I would have given you in ordinary cars." I says, "According to the contract we have no specifications as to how many you are going to put in the car, and the cars being scarce we want to load them all we can." I says, "That is to your benefit." He says, "No sir. I could get \$1000 more for some of these cars." "Well", I said, "You couldn't get that when I took them at \$40.

(Testimony of S. J. Kornblum.)

a thousand dollars more, and you didn't object to that." I says, "Why do we want to quarrel now about that? Give me all you can. Go right on and give me as many as you can, but give me these cars that you are loading somewhere else." So then I told him, "Well, all right, I will reduce that 10 cars; I will make it 90 cars from the fact that you overloaded these cars." "Oh, no; I will not give you no 90" he says, "60 cars is all I am going to give you. That is 15 more." So I says, "Why that is ridiculous. I can't accept 15 more cars." I says, "I can make \$55,000 more and you are just going to rob me out of \$55,000." I says, "I was good enough"—or I reminded him then of the fact that this contract was made without any money at all. The wires that he sent back East to me was that the purchase would be without money and I told him that.

. . . . .

I told him, "Now I was good enough to give you the \$10,000 about the 15th of August, and the market was then dropped down to \$40 a ton and my \$10,000 that I gave you then was wiped out, and that shows you how faithful and how white I was in the matter. Now when the grapes are \$85 and \$90 you say you are not going to give me only 15 more cars after giving me 45, and the most of these 45 cars was delivered when they were \$40 and \$45" So he says, "Well, what is the use you giving me this song and dance?"

(Testimony of S. J. Kornblum.)

"Well," I says, "what is the use of arguing about it now? Why don't you go on and give me all you can? Give me a couple of cars a week and you will be giving me the grapes and we won't have any fight about it. I am getting along with everybody else." But he says, "You fellows in New York can't put anything over on me." He says, "I am too long in the business and I know you." "Well," I says, "I am not going to sign any papers," I says, "I will be signing my life away giving you 40 cars of grapes, which I can sell right away for \$30,000 profit." I could sell them in the lobby for \$30,000 profit. Well, all right, he got up off of the chair and he started to go, and I called him back and I says, "See here, Mr. Emerzian, I don't want a lawsuit. I have got to go back East and I want to go back clean without any lawsuits." I says, "Make that 25 cars more and I will sign that paper." He says, "No, I will give you 15, and the next car I am going to load I will sell it for whatever price I can get and you may as well sue me for 55 cars as any.

. . . . .

I told Karl it was a pretty hard pill to swallow "but I will have to submit" and I sat down and started to write. I announced what I was writing, and then he says, "You put in, 'Car shortage'" I says, "You go to hell." I says, "Car shortage now with 15 cars you are going to give me?" I says, "I will never get a car now." I was getting

(Testimony of S. J. Kornblum.)

mad, and I started to tear up the piece of paper. He says, "Hold on Kornblum," and he says, "All right, we will put down for shipment" and the next few words he says, "Put down Camp Five, Minkler Ranch." I says, "What is that? That is a new one. We haven't anything in the original contract about Minkler Ranch and Camp Five I don't know where Camp Five is. I know where the Minkler Ranch is, because you showed it and the other ranches to me when I bought the grapes, and now it is Camp Five, and I am not going to sign it." So he was at the door and started to unlock the door, and I says, "All right, I will concede you that," because I hated to have a lawsuit. I told him, "I have got to go back clean." So I submitted to that and I signed the paper.

EXCEPTION NO. 3.

Q I will ask you this: Did any request come from you at any time to reduce the number of cars?

MR. COSGRAVE: Objected to as calling for the conclusion of the witness, if the Court please.

THE COURT: He may answer yes or no and then state what was said.

A Positively not.

The Witness continuing: I gave him \$10,000. Of this amount \$4700 has been repaid to me. There is \$5300 now due. The usual understanding among fruit men of "suitable for Eastern shipment" is that

(Testimony of S. J. Kornblum.)

they must be absolutely sound here because it takes fourteen days to get back East and when they are anywise like decayed here when they leave, they surely arrive rotten in New York. Mr. Emerzian never tendered any bills of lading that I refused to accept but Mr. Maljan did. After October 18th I accepted three cars from Emerzian. On October 26th I accepted the last car of grapes. No bill of lading was tendered me by Emerzian after the 28th that I refused to accept. Pete Maljan told me that there were grapes from the Minkler ranch that were going to be loaded for me about the 29th or 30th of October. I went out and I saw him loading a car from his platform. The grapes were useless. They were rotten. They were leaking right out of the boxes. Every time the loader lifted the boxes they were just running out. The juice was running out. Mr. Emerzian's son was there and I told him we were not going to take the grapes. It rained for three days and we saw the grapes there on the platform. The water dripped right off of the platform right through the floor. The grapes were entirely useless. I told him we were not going to take them; that is I told his son. His son was in charge of the grapes at that time. I called the attention of Emerzian's son to the car that remained on the platform, and I says: "For God's sake, your father don't intend to send me these grapes? This car I will surely not take." "Well," he says, "come back here in about an hour, and I will have him on the telephone, and I will let you know what

(Testimony of S. J. Kornblum.)

he is going to do with them." So I *So I* went on up and looked after some more business, and in maybe two hours I came back and seen his son. He says: "I had a talk with my father, and he told me that he is going to take this car of grapes himself and make wine." So the next day, or the following day, I came up there, and the grapes were not on the platform any more, but I saw a part or a truck—a Ford truck,—going with some grapes into the ranch, and I followed that truck, and I saw a whole lot of the grapes that was on that platform was in the back of the mule barn right on the manure, and they were leaking there, and it had rained then. Well, the next day again that car was there and they were loading them into the car from the barn.

EXCEPTION NO. 4.

Q BY MR. CONLEY: What was the condition of the grapes that you saw they were loading on the car the next day you were there?

MR. COSGRAVE: Just a moment. I ask that my motion go to all of the evidence of this witness respecting the grapes that he is describing as having been on or about the 29th or 30th of October, for the reason that so far he has not connected a single box of grapes with any that he has received or had tendered to him.

THE COURT: He can testify to what he saw and we will see whether they are connected up as being the same grapes that were tendered to him.

(Testimony of S. J. Kornblum.)

Q BY MR. CONLEY: Just go on.

THE COURT: Just tell what you observed, not your conclusion.

A Yes, your Honor. I observed that the same truck was backed up against the barn, and two or three men put them grapes up from the floor onto the truck. I went away, and then I was in Taylor's packing houses and I watched and seen that same truck backed up against the car and load these grapes.

The witness continuing: The following day he tendered me that bill of lading for that car and the car previous, that is, Mr. Maljan did. I told Mr. Maljan he ought to be ashamed of himself to offer me that stuff, that I would not take it as a gift. He never made a tender of any other bills of lading for Muscat grapes that I refused excepting those two.

EXCEPTION NO. 5.

Q I will ask you, Mr. Kornblum, what was the value of Muscat grapes in this valley f. o. b. refrigerator cars from the 1st to the 10th of September, 1922. and all of these questions will be the same.

MR. COSGRAVE: We renew our objection to that, if the Court please, on the ground it is incompetent, irrelevant and immaterial, and I want to make this suggestion, if it is at all material it is on the ground that there was a breach of the contract. No breach has been alleged, as I under-

(Testimony of S. J. Kornblum.)

stand, or even claimed, prior to the 26th of October.

THE COURT: I will admit the testimony; and I am willing to hear you further, Mr. Cosgrave, on the argument, as to the application of it.

THE COURT: I will admit the testimony showing the whole range of prices during the whole period, and leave it open for you gentlemen to argue further if you care to.

Q BY MR. CONLEY: State the value from the 1st to the 10th of September, 1922.

A The 1st of September there were quotations at \$37.50 a ton f. o. b. refrigerator cars. There might have been just one or two sales, but the general price was \$40 on the 1st of September.

The witness continuing: On September 10th the price was \$47.50, September 20th \$65.00, October 1st \$70.00, October 10th \$72.50 to \$75.00, October 15th \$82.50, and on the day of this writing you couldn't place any for \$90. There were numerous cars sold during the season at \$90.

MR. COSGRAVE: Just a moment, let our objection on the ground that the evidence is incompetent, irrelevant and immaterial appear before the answer.

THE COURT: Yes, it is overruled and you may have an exception.

The witness continuing: The price kept climbing



(Testimony of S. J. Kornblum.)

gradually up to the 23rd of October, then the market went down.

EXCEPTION NO. 6.

Q BY MR. CONLEY: I will ask you if you purchased any Muscat grapes that year from others than the defendant in this action?

A No Muscat grapes, but I did buy others.

Q You only bought, as I understand your testimony, forty-eight cars?

A There were delivered forty-eight cars, but I had to go outside in the market and pay \$85.00 and \$87.50 to supply my grapes.

MR. COSGRAVE: Just a moment; objected to—

MR. CONLEY: That is what I want, exactly.

MR. COSGRAVE: I desire to object to the evidence and have the objection come before the answer, on the ground it is incompetent, irrelevant, and immaterial, and not the proper measure of damages as to what this defendant had to pay for grapes.

MR. CONLEY: The purpose of the testimony, if your Honor please, is just to show the impossibility of the truth of the statement of the first witness that was upon the stand that this man came to him in the hotel and suggested a modification of that contract by agreeing to accept 60 cars instead of 100 as he had originally contracted for, and our opinion is that if we can show that at that very time and in this town and

(Testimony of S. J. Kornblum.)

during the months of September and October he went out and purchased Muscat grapes at \$85 to supply his customers it absolutely negatives the testimony of the first witness who was on the stand, or at the most throws very strong suspicion upon the truth and accuracy of his statements.

THE COURT: Objection overruled.

Q BY MR. CONLEY: How many cars of Muscat grapes did you buy in Fresno County from the 1st day of September until the season was over, during the year 1922?

A I bought—

MR. COSGRAVE: Let our objection go to all of this testimony.

THE COURT: Yes; and overruled.

A 85 cars.

Q BY MR. CONLEY: Then if my figures are right, in addition to the cars purchased from Emerzian you purchased 37 cars of other Muscat grapes?

A Yes, sir. I had outstanding contracts unfilled on the 18th day of October, 1922 for the delivery of Muscat grapes.

EXCEPTION NO. 7.

Q Why did you make these outside purchases? Did you have any reason for it?

A Because I couldn't get them from Emerzian.

MR. COSGRAVE: Just a moment. Our contention is that the measure of damages in this

(Testimony of S. J. Kornblum.)

case does not depend on whether this plaintiff went and bought grapes or not.

THE COURT: It is not offered for that purpose. It is a circumstance, only, as tending, if it does, to contradict the witness who has testified in regard to what this witness stated to him.

MR. COSGRAVE: I suggest, if your Honor please, that evidence of this kind might be material on the cross-examination of the defendant, but not in support of or proof of a fact from which an inference can be drawn that he did or did not do a certain thing. It is purely self-serving, so far as the plaintiff is concerned, to show that he went and did a certain thing, and to say that because of that it is probable that the defendant himself was not telling the truth on the witness stand. That is what it means, and I suggest evidence of that kind is entirely irrelevant and immaterial.

THE COURT: I will permit it; overruled.

A I sold grapes on the strength of this contract.

MR. COSGRAVE: And we object on the further ground, if the court will allow me to do so, that there is no pleading here that these grapes were purchased for any special purpose, and it certainly is the rule of law that in the absence of such an allegation no evidence of this kind is admissible.

(Testimony of S. J. Kornblum.)

EXCEPTION NO. 8.

Q BY MR. CONLEY: After you entered into this contract with Emerzian for the delivery of those 100 cars, did you or did you not enter into contracts with people in the East to deliver them Muscatel or Muscat grapes?

MR. COSGRAVE: We object to that on the ground it is incompetent, irrelevant, and immaterial, and not a proper element of damages in this case, and not within the issues made by the pleadings.

THE COURT: Yes, it is not admitted for the purpose of showing damage, and it is overruled otherwise.

Q BY MR. CONLEY: You may answer the question.

A Yes, sir; I entered into agreements to deliver grapes on the strength of the contract that I knew I had 100 cars, and that I was going to get them when I was told.

MR. COSGRAVE: And we object on the further ground, if the Court please, that evidently this was in writing and the contracts themselves are the best evidence.

THE COURT: Objection overruled.

EXCEPTION NO. 9.

Q Mr. Kornblum, I will ask you, after the 18th day of October, 1922, until the 26th day of October, 1922, whether or not you purchased any cars of Muscat grapes from persons other than the defendant in this action.

(Testimony of S. J. Kornblum.)

MR. COSGRAVE: We object to that as incompetent, irrelevant, and immaterial.

THE COURT: The same ruling. It is not admitted for the purpose of establishing damage, but is admitted for other purposes. Overruled.

A Yes; I bought all I could get.

Q BY MR. CONLEY: How many did you get?

A About 20 to 22 cars.

Q What price did you pay for them?

A I paid up to \$87.50. I bought them as low as I could. I bought some at \$85, and around \$87.50. That is the highest price I paid.

Q And what was the purpose of making those purchases?

A To fill my contracts.

MR. COSGRAVE: Of course our objection goes to all of this line of testimony.

THE COURT: The same ruling.

The witness continuing: After October 18th Emerzian delivered 3 cars of Muscat grapes. The last was delivered on the 26th.

I am president of the corporation of S. J. Kornblum and William Kornblum and do all the buying and make contracts and I have authority to sign checks and have done so all over the State of California. Neither Mr. Emerzian nor anyone for him after I rejected the two carloads of Muscats we have been talking about ever tendered any bill of lading for any other car of grapes on November 2nd or 3rd or 11th. The last he offered

(Testimony of S. J. Kornblum.)

or tendered me was the two cars and I told him I simply wouldn't take them and I demanded my \$5300 back and demanded \$25,000 to replace what I paid for the difference in the other cars. He laughed and he said "You try and get it."

EXCEPTION NO. 10.

MR. CONLEY: . . . For the purpose of enabling the Court to determine the capacity of the cars, we offer as one exhibit all of the manifests that were furnished by the defendant to the plaintiff in the action, and for that purpose only.

MR. HAYHURST: To which we object, if the Court please, on the ground it is immaterial, irrelevant, and incompetent. The mere fact that the cars were loaded in some instances to 15 or 16 tons is no indication of what was the intention of the parties. We think that "a carload" has a meaning and that we can show the meaning of the parties by the custom of the shippers, and that the railroad company, except in times of extreme car shortage, fixed a capacity to those cars of 12 tons.

THE COURT: Isn't it an indication of what the parties intended by considering what they actually did as far as they went?

MR. HAYHURST: I suppose that is what it is offered for.

THE COURT: That is a common rule of interpretation, when the parties under a contract have proceeded in a certain way, that that is evidence of what was intended to be done.

(Testimony of S. J. Kornblum.)

MR. HAYHURST: I recognize that rule, your Honor, but I still make the objection.

MR. COSGRAVE: If the Court please, there is an additional element in this: The Court will realize that very shortly or a considerable time after this contract was made and about the time this shipment began there was a very acute shortage of cars, and we expect to show that the parties loaded them to utmost capacity at that time.

THE COURT: That of course might be subject to variation by evidence that you might have to offer. The objection will be overruled.

Cross-Examination.

The Witness testified: My late brother was Eastern manager of the corporation in the summer of 1922. He died during that fall. He died the day after I came back and I told him we got a lawsuit. The fact that when this complaint was first filed we were styled a co-partnership and not a corporation escaped my attention. We had made some losses on that year's business. When I made this agreement with Mr. Emerzian, Mr. Maljan was the broker and represented both of us. The contract was made on June 12th. Mr. Emerzian had taken me around to some vineyard but the grapes were not matured. I didn't express a preference for any vineyard. My business is handling grapes of all characters. I was just buying Muscat grapes. As far as I was concerned they could use them for anything they wanted to. I was buying them to re-sell them. The purpose my customers use

(Testimony of S. J. Kornblum.)

them for didn't concern me. My firm negotiated the sale of these grapes to various people in and about New York City. I don't know whether they were to be used for table grapes or not. All white grapes are table grapes. It didn't concern me what they were going to use them for. It is not a fact that these grapes were to be used for wine purposes and that they were bought from my firm for that purpose and that is a purpose I had in mind.

EXCEPTION NO. 11.

Q I say, if they are used for wine purposes they are crushed immediately, aren't they?

MR. CONLEY: We don't desire to make any captious objections, but it seems to me that is argumentative.

THE COURT: Yes; in view of the witness's answer that he had no such knowledge. I will sustain the objection.

The Witness continuing: I saw the grapes when they were on the vines during the summer of 1922 in Tagus and at the Minkler ranch. The shipment began about September, I believe. I will concede that the bills of lading show issuance of 3 on the 4th of September, 2 on the 5th, 3 on the 6th, 2 on the 7th and 1 on the 8th and 1 on the 9th. I testified that Mr. Emerzian presented me 12 bills of lading one day but concede that they were loaded at the times and on the dates that I have just read. There was a slight car shortage that year all through the season. My understanding is that reliable shippers delivered 100



(Testimony of S. J. Kornblum.)

per cent that year. It wasn't exceptional that year. Every year it is the same way, everybody wants to load at once.

EXCEPTION NO. 12.

Q Were you here during the past season of 1923?

A Yes sir.

MR. CONLEY: One moment; if your Honor, please, I object to all of this line of testimony, and base the objection upon the allegations of Paragraph II of their answer, and call your Honor's attention to the wording of it. (Reading).

MR. COSGRAVE: If your Honor please, we plead we are able to perform our contract, and our contract provides that it is subject to shortage of cars, and when we plead we are able to perform it means such cars as were available at that time. The objection of this is, if the Court please, this witness testified that he made this new contract as a guarantee that that clause of the original contract was to be eliminated, as I understood his testimony—

MR. MILLER: No.

MR. COSGRAVE: I will take his testimony and not yours, Counsel,—that he was to be sure of 15 cars. That was his testimony on the witness stand. I want to show just how far that was an element in this situation. If that is the case, it is going to throw a slightly different light

(Testimony of S. J. Kornblum.)

upon the situation from what we have heretofore had.

MR. MILLER: What difference does it make, your Honor? We contend all the way through, your Honor, that there was no modification of this contract because a modification not lived up to or a modification without any consideration does not eliminate the original contract where there is a supplement to a contract \* \* \*

THE COURT: I will sustain the objection.

The Witness continuing: Up to the 18th of October I complained about Emerzian not performing the contract. I had been asking him every night when he came into the lobby how many cars he had loaded for me. I had knowledge that he was shipping other cars. I knew he had other ranches that he was interested in with his brothers. I complained about his failure to give me cars. He told me "I have got over 300 cars of grapes and I am not going to sell another car until your 100 cars is delivered." This was when I made the contract. I had no other arrangement with Mr. Emerzian for buying black grapes.

(It was here stipulated between counsel that exception to all adverse rulings of the court might be shown in the record).

THE COURT: Then Mr. Reporter, if you should write this record up, wherever there has been an objection heretofore, the exception of counsel will show following the ruling.

The Witness continuing: I don't remember writing

(Testimony of S. J. Kornblum.)

any memorandum or slip of paper about the sale of any other grapes than in this contract. I never at any time said to Mr. Emerzian that he was to apply about \$3000 of the money already in his possession on any other contract. I didn't do anything of the kind. I don't know what slip of paper you refer to. On the 18th of October I hadn't terminated the contract because he failed to give me cars fast enough. I never did terminate the contract at any time. I wrote the contract dated October 18th.

(Here the agreement of October 18th was offered in evidence by defendant, admitted and marked Defendant's Exhibit "B" and "C", which said exhibit is in words and figures as follows:

S. J. Kornblum  
of Brooklyn N Y

(S)

SEQUOIA HOTEL  
E. C. White Mgr.  
FRESNO, CALIFORNIA

October 18th 1922

I hereby agree to accept On the 100 cars Moscats to be loaded in refergerator as per contractt up to the present time he K Emerzuan allready delivered 45 cars K Emerzian to deliver no less than 15 cars more that will make 60 cars instead 100 cars if Minkler ranch however has more he agrees to deliver all

S. J. Kornblum  
of Brooklyn  
N Y

(Testimony of S. J. Kornblum.)

(S) SEQUOIA HOTEL

E. C. White Mgr.

200 rooms

10/18

I hereby agree to accept On the 100 cars Muscat to be loaded in refrigerators as per contract up to present time he K Emerzian already delivered 45 car K Emerzian agrees to deliver 15 more cars anyhow Or if there is more on Minkler Ranch Camp Six he must give to me or deliver

S J Kornblum

K Emerzian )

The Witness continuing: The price of Muscat grapes went off that year on October 23d, I believe. I was in constant communication, telegraphic and otherwise, with my brother in New York City throughout the season. It is not a fact that on October 18th 15 additional cars were all that I could handle. It is not a fact that I had received advices from my brother in New York that the market on Muscats were weakening. The market broke on the 23d and gradually lowered. It broke three, four or five days due to rain damage. There had been no rain in October that would damage the goods reaching New York about the 25th or 26th. People wouldn't buy because they knew the grapes was damaged by rain and that was the cause of the lowering of the market. No rain occurred prior to the 23d.

Q But there having been no rain damage on

(Testimony of S. J. Kornblum.)

the 23d and the market beginning to break on the 23d, how did that affect this situation?

A How did the market get lower, do you mean?

Q How did it get lower because of rain damage before there had been any rain? You can't answer that, can you?

A I don't understand your question.

The Witness continuing: The rain damage was not an element in the break in the market on the 23d. That wasn't the cause of the market breaking because of the rain, not on the 23d, but you said the latter part of October. I don't know what did cause the break in the market. I know the market lowered. I assume that Karl Emerzian is well fixed and able to respond to any judgment. I thought I better take 15 cars, better than nothing. It was my understanding that he was going to deliver the 15 cars in the next few days when the agreement was accepted. I was not going to let him put in "car shortage" in that so he would have an excuse. I knew Mr. Emerzian was responsible financially but I didn't give up 40 cars of the valuable grapes voluntarily. I thought half a loaf was better than nothing. I agreed to accept the measly 15 cars because a measly 15 cars was worth then \$9000 and I thought I better take \$9000 and put it in my pocket than to sue for the 40 cars of grapes which amounts to \$30,000. He alleged that he overloaded the cars and nobody else was delivering and he had tried to get the grapes and he hadn't gotten them he

(Testimony of S. J. Kornblum.)

said and I would have to fight all of that to win my 40 cars and I thought I better get the 15 cars if I could. He told me positively he wouldn't give me any more cars. He was going to load the next cars and sell them in the lobby whatever price he can get so I thought I better get the 15 cars.

We were in my room about an hour and a half. He asked me to lock the door and I did. He says "You give me a paper that I will accept 15 cars instead of 40" and I didn't want to. He said "The next car I am going to load I will sell for whatever I can get in the lobby and you may as well ask for the 40 cars as less. You are not going to get another car." To avoid a law suit I signed. This was before I signed. He told me "You give me a paper that you accept 15 cars instead of 40." I don't know why he agreed to give me all on the Minkler ranch. It took us half an hour, the argument. I didn't want that Minkler window in so he could fly out but that was the last consideration and I wanted to avoid a lawsuit and he made me put in this Minkler proposition and Camp Five and I didn't know where it was any more than Camp 105. It isn't a fact that I asked Mr. Emerzian to reduce the number of cars that I was compelled to take from 100 to 60 and he agreed to it in consideration of my agreement to take all that were on the Minkler ranch. I took a car on the 26th notwithstanding that the market had lowered. I suppose I got the cars after the 19th just about as fast as I did before except at the very beginning of the season.

(Testimony of S. J. Kornblum.)

EXCEPTION NO. 13.

Q To whom else, other than to Charles Emerzian, the nephew, did you tell that this contract had been extorted from you?

MR. MILLER: What difference does that make? We object to it.

MR. COSGRAVE: I think it is very important to show whether it came at his suggestion or Karl Emerzian's suggestion.

MR. MILLER: It wouldn't reflect the transaction between the parties. It is immaterial.

THE COURT: I will sustain the objection

The Witness continuing: I never told Karl Emerzian that he obtained this contract by coercion or compulsion. He knew it. He was there. I never examined any of the grapes shipped from Minkler other than two cars that I have testified to. I wasn't interested in any more of the grapes. I would not have been interested in any Muscat grapes at any price after the 1st of November. On the 26th the market price was \$40, maybe \$50. The market would go off \$25 in a single day. There was no market at all on the 28th. You couldn't give them away. I didn't examine the car I got on the 26th nor the one I got on the 23d. It was not my custom to examine the cars as they were brought in or as the bills of lading were brought in. I was always pleased with the stuff that was loaded before the rain.

The first time I told Mr. Emerzian that the contract was off and that I was going to sue him was when

(Testimony of S. J. Kornblum.)

I demanded my money back. That was at the time when the two cars was tendered me. I got news that the market was down every night. The first night on the 23d, and on the 23d it went off 25 cents a lug back East. There are 1400 crates to the car ordinarily I believe or 1360. If there were 15 tons to a car that would be about \$340 a car. If there were 15 tons to the car that would make a difference of about in the neighborhood of \$20 a ton. I didn't get any news before the 23d that there were 3,000 cars in New York that could not be sold. I have not any wires or telegrams that I received from my brother in New York at that time. They are back East. The market went off more on the 24th, 10, 15 or 20 cents more. It went off gradually every day. I bought some grapes after the 23d. I guess I bought the 24th and 25th maybe. I took bills of lading from everybody that I had bought them from previously. They offered them to me and I took them. The goods I took after the 23d or 24th were goods that I had contracted for before that time.

Q Did you buy any goods after the 23d.

A I don't remember of buying any, no sir. I had frequent talks with Mr. Emerzian following the 18th, 23d and 24th. I never had any conversation with him where I proposed to him that I would take his grapes and he and I stand the loss after October 23d together.

Re-direct Examination.

The Witness testified: Mr. Emerzian never paid



(Testimony of Walter Bonnett.)

any part of this \$5300 nor of the \$25,000 damages. I had a great many orders to fill that I couldn't get grapes to fill. I did not fill them after the 23d. It was after the 18th. I bought all of 10 carloads. I bought from people in the lobby, from Sakajian and from Jack Files and I believe from Mr. Foley. Mr. Sakajian was a partner of mine at that time. I think he had one or two cars. I don't remember buying any from Mr. Foley. I can't say where I bought the cars but I know I bought a lot of cars.

EXCEPTION NO. 14.

Q Did you see any grapes that were fit for shipment to the Eastern markets after that date?

A No, sir.

MR. HAYHURST: That is objected to on the same ground.

MR. COSGRAVE: We desire an exception to the rulings, if your Honor please.

WALTER BONNETT

sworn as a witness for plaintiff, testified as follows:

My name is Walter Bonnett. I am *metereologist* of the United States Weather Bureau and have been in that service 22 years and in Fresno nearly 14.

EXCEPTION NO. 15/

Q BY MR. CONLEY: Refer to your records and tell us what the precipitation was in the months of September and October, 1922.

A In the month of September there was no rain at all at Fresno. In the month of October,

(Testimony of Walter Bonnett.)

on the first day, there was a trace, that is, an amount too small to measure, or at least less than one-hundredth of an inch. On the 2nd day of October there was .01 of an inch. There was no rain then until the 27th, when there was .51. That is all the rain in October.

A What was the precipitation here in the month of November, the first ten days of November?

MR. HAYHURST: Do our objections, if the Court please, and exceptions, go to all of this testimony?

THE COURT: It may be shown.

MR. HAYHURST: We would like the record to show our objections and exceptions to the ruling if the ruling is to be the same.

THE COURT: It is understood that you object to all evidence as to the rainfall for September, October, and November, 1922?

MR. HAYHURST: Yes, sir.

THE COURT: And the objection is overruled and you may have your exception.

Q BY MR. CONLEY: What was it for the first ten days in November?

A On the 2nd day of November there was a trace; no rain then until the 7th, when there was .12. On the 8th, .09; on the 9th, .29, and on the 10th, .11/

#### Cross-Examination

The Witness testified: The rain records that I have are from observations made here in the city during

(Testimony of F. M. Withers.)

the time mentioned. From my experience as a weather man in this vicinity, it has been my observation that the rainfall, even in different portions of Fresno County varies greatly according to the locality in the county. Sometimes the variation is material within a few miles. The record of rainfall in Fresno City is not necessarily an indication of the rainfall at a place 20 miles from Fresno. Sometimes we have quite a precipitation in Fresno City but say 15 or 20 miles away there will be a very light precipitation and vice versa and possibly none at all.

#### F. M. WITHERS

sworn as a witness on behalf of plaintiff, testified as follows:

My name is F. M. Withers. I reside in Los Angeles and am in the fruit and produce business and have been in such business about ten years. My experience has been shipping all kinds of fruits and produce all over the state, especially grapes during the grape season, particularly in Fresno County. I have operated in Fresno County the last three years. During 1922 I handled between 175 and 225 cars. The first heavy rain came October 26th, 27th or 28th. It was around that time. I know where the Minkler section is. I was buying grapes out of that section. I don't know how much rain they had there but there was a heavy rain storm in the entire county as I remember it. I saw the grapes all over the county after the rain. The grapes were generally damaged from the rain. In my

(Testimony of F. M. Withers.)

opinion none of those Muscat grapes were suitable for Eastern shipment after the rains came. Due to the fact that the berries were getting away from the cap stems and in some instances starting to blister and show spots due to rain damage in my opinion. If that kind of grapes had been shipped they would reach the market like New York in decayed condition.

Re-direct Examination

EXCEPTION NO. 16.

Q What was the price of Muscat grapes from the 1st of September until the 1st of October?

MR. COSGRAVE: We renew our objection to this line of testimony on the same grounds heretofore urged.

THE COURT: Yes; and the objection is overruled.

MR. COSGRAVE: And we take the same exception.

Q BY MR. MILLER: F. O. B. Fresno.

A From the 1st of September to the 1st of October the market started out on Muscats for the season, which is practically the 1st of September, around \$37.50 a ton f. o. b. cars, and remained stationary for about a week, from \$37.50 to \$40. Then the market started to climb, and around the 1st of October the market was in the neighborhood of \$60 to \$65 a ton, as I recall.

Q From the 1st of October until the 18th of October what did it get to?

A The market kept on climbing on all va-

(Testimony of M. N. Bakalian.)

rieties of grapes which included Muscats, and around the 18th of October the market was very strong, at \$85 a ton.

Q What was the highest it got during the season?

A I heard of some sales higher than \$85, but I didn't make any myself, so \$85 is what I would want to base my figure on.

The Witness continuing: The market went off as a matter of common history on the 23d.

#### Re-cross Examination

The ready sale of grapes did not stop between the 15th and 20th, no, sir, not until the 23d. It happened in 24 hours. The cause might have been the immense number of cars shipped from this neighborhood.

(Here an adjournment was taken until January 29, 1924, at 10 A. M.)

#### M. N. BAKALIAN

sworn as a witness for plaintiff, testified as follows:

My name is M. N. Bakalian. I live in Fresno. I knew Mr. Kornblum in 1922. About the latter part of October, 1922, I was shipping grapes. We were shipping in a partnership with Mr. Sakajian and Mr. Kornblum. I remember on one occasion going to Exeter with Mr. Kornblum. He took me down to Minkler Station and examined some grapes while there. It was after the rain of that fall about the last of October or the first of November. I can't remember just the date. It was after the rain. We examined the grapes

(Testimony of H. Sakajian.)

there. They were on the track on the car at the station. The grapes were mouldy and wet. They were not fit for Eastern shipment. The grapes were wet and they were getting mouldy and rotten.

#### Cross-Examination

The Witness testified: I was in partnership with Mr. Kornblum at that time but not in those particular grapes. I was partner with him this year. I have no business relations with him now and do not know whether we will be partners in next year or not. The grapes that I saw were about four or five hundred boxes—I don't know, I can't tell, I am guessing at it. The boxes were on the car—part of them loaded in the car. I don't know what kind of a car it was. It wasn't a passenger car. It is about two years and I cannot remember. I don't remember whether it was a box car or not. I don't know how long the grapes had been picked. Mr. Kornblum told me they were Karl Emerzian's grapes. Outside of that I don't know whose grapes they were. Mr. Kornblum talked to a man there. He kicked about the condition of the grapes, that they were not suitable to be loaded. The man said he couldn't do anything else besides just doing what was ordered of him. I don't remember whether the man said these grapes were for Mr. Kornblum or not.

#### H. SAKAJIAN

a witness sworn on behalf of plaintiff, testified as follows:

My name is H. Sakajian. I live in Fresno. I have known Mr. Kornblum since 1919 or 1918. Since 1919

(Testimony of H. Sakajian.)

I have been somewhat connected with Mr. Kornblum in a business way. He and I were interested in buying grapes in this locality and shipping them East. I ran a grape-packing house for three years, I was foreman for some California growers or shippers for three years. I am also a grower of grapes and have been familiar with growing grapes for eight years. At my home in the old country I used to know about grapes. I have been engaged in the growing and marketing of grapes in Fresno for ten years. When I used to work for the California Growers & Shippers we rolled two or three hundred cars a year. I was not interested in the grapes involved in this lawsuit. I know where Minkler Station is. I don't exactly remember when the rains came in 1922 but I know it was in the latter part of October. I saw one car of those grapes at Minkler after the rain and saw the grapes in the car. They were wet, absolutely wet grapes. There was juice running out and rain and water. The grapes I saw were not suitable for Eastern shipment. They were rain damaged. These were Muscat grapes. After the heavy rain of the latter part of October, 1922, there were no Muscat grapes or Malagas that were fit for shipment to an Eastern market.

#### Cross-Examination

The Witness testified: I didn't notice whether there were any other cars of grapes there at that time. There is a little shed standing there, a platform. I didn't notice whether the top was covered or not. I

(Testimony of H. Sakajian.)

do not remember the number of the car. It was a refrigerator car. It was lug-filled. When I was there the loader was waiting for another load to finish the car. The car was almost full. I think there were seven or eight hundred boxes in the car. They were open lugs and were stacked all over each other in tiers. I went into the car and examined them. I could see the top layer, two or three rows on each side. I didn't take out any of the boxes or touched any. They must have been picked after the rain because they were wet unless they sprinkled water over them. I could see water on top of the grapes. They were soaked. The grapes were wet. I was there about five or ten minutes. We just looked at them and walked off. The name of the loader was Mr. Tarzian. I don't know where the grapes came from. I closed the season with Mr. Kornblum that year on the 10th of November. The last car of grapes went out on the 10th of November, if I aint mistaken. I didn't personally attend to any shipping from this locality after November. It was not because of the rain that we didn't ship any more grapes after the first of November. It was because we didn't have any grapes left here. Everything we had under contract we had cleaned up and shipped by the first of November, in Fresno but not in Exeter. I am still interested with Mr. Kornblum. We own a ranch together. It is a vineyard. On this visit to Minkler with Mr. Kornblum, I don't remember where we went besides this station. I guess we went to Arakelian's shed but I don't remember. We had business down



(Testimony of E. Y. Foley.)

at Exeter and just stopped a few minutes at Minkler to see this car and went right on to Exeter.

E. Y. FOLEY

sworn as a witness for plaintiff, testified as follows:  
My name is E. Y. Foley. I am a fruit shipper and have been in that business for 18 years. I am familiar with the market price of grapes during the year 1922.

EXCEPTION NO. 17.

Q Mr. Foley, will you state to the Court what the value of Muscat grapes per ton was from the first day of September until about the tenth day of September, 1922?

. . . . .  
MR. COSGRAVE: We object, of course, to this line of evidence upon the grounds stated yesterday, that is, that it is incompetent, irrelevant and immaterial and not tending to establish a proper measure of damages in this action.

THE COURT: Objection overruled.

. . . . .  
A We started selling Muscat grapes in the early part of August forty to forty five dollars a ton. On the 25th of August we sold them at \$52.50. On the 27th of August we sold at \$60.00 a ton. On the 29th of August we sold at \$62.50 a ton, and the market from the first of August ranged from \$62.50 to \$72.50 a ton.

MR. CONLEY: You mean September, don't you?

(Testimony of E. Y. Foley.)

A From the first of September to the 25th of September.

Q You used the term "August."

A I meant September. We did not sell any, however, at \$72.50 a ton until the 23rd of September. From that time on we sold up to the third of October at \$80.00. From the 3rd to the 6th we got \$85.00 and I sold a car on the 13th for \$100.00 and that was the last sale we made on Muscats.

The Witness continuing: The figures I have given represent the market value of those grapes during the time mentioned. After the 10th nobody had any grapes to sell on account of the car shortage and you could get almost any price you asked for a car for a period of a few days. About the 2nd of October Mr. Kornblum got five cars of grapes through us at \$82.50 a ton. I have an indistinct recollection of when it rained in 1922, on October 27th we had about half an inch of rain. The grapes most susceptible to rain damage are white wine grapes and Muscats. Malagas are a much stronger grape than a Muscat. Most of the Muscats lay close to the ground. Of course there are some of the vineyards with high vines that are off of the ground but there are not many of those. After October 27, 1922, I saw some grapes that were sound but I have my doubts about them carrying to the Eastern market. The railroads were making extremely poor time and we were not able in the season 1922 to get any grapes to the Eastern market before the rain

(Testimony of E. Y. Foley.)

and how could we expect to get them there after the rain? What I saw after October 27th were in worse condition than they were before that. They were soft occasioned by the rain. Whether or not any Muscats that had been rained upon and became soft were fit to ship to Eastern market would depend entirely upon the purpose that they were to be used for and the condition of your market. After rain the grapes have a tendency to get soft and they crack around the cap stems and it makes them start to mould. I didn't see any grapes after October 27th that were free from rain damage.

#### Cross-Examination

The Witness testified: I discontinued shipping all grapes after the 23d of October due to no market you might say in the East. I was not able to get any buyers for any kind of grapes in Fresno after the 23d of October. A good many of the Muscat grapes were used for wine making purposes. Eighty five per cent I think of all the grapes that were shipped for the table or anything else have been used for wine in the last two or three years. The rain occurred on October 27th. I wouldn't call it a heavy storm. It was about half an inch in Fresno. That is not ordinarily a very serious item in the grape industry. We have shipped grapes after we have had more rain than that. It would depend largely on whether the vines were high vines or not. I have seen lots of grapes, Missions and other varieties of grapes, that looked good—the high vines—after rains but at the same

(Testimony of Karl Emerzian.)

time they have had trouble at the Eastern end when the goods arrived. We have cases where the grapes went through in good condition but in most cases they do not carry well. The best comparison I can give you is we are still shipping grapes yet from last year's crop and they are still taking them. Some of them are going out of cold storage. The last season we didn't quit shipping until the 23d of December which was due entirely to the demand and purposes they wanted the grapes for. We had seven or eight heavy frosts, I think. I don't know whether they make brandy out of them or wine or what.

I couldn't sell any grapes in Fresno after the 23d and didn't attempt to buy any Muscat grapes. On the 23d you might have found a buyer on the 23d and 24th but the Eastern markets broke badly on the 23d and all indications were for heavy decline and nobody was looking to buy grapes among shippers. They were trying to unload what they had.

#### KARL EMERZIAN

re-called by plaintiff, under the provisions of Section 2055 of the Code of Civil Procedure of the State of California, testified as follows:

The bills of lading tendered to Kornblum after October 18th were tendered by me personally. I offered them and also Mr. Maljan did. I can't remember whether I gave him every one of them. I don't quite remember those dates exactly. One I offered him on the 26th and the next one on the 28th

(Testimony of Karl Emerzian.)

and the next one on the 2nd; the next one on the 3d and the next one the 5th of November. I don't exactly know which I offered him on the 11th of November but I offered him every one. He refused to take them. These grapes were all from the Minkler ranch. I had enough grapes on the Minkler ranch to fill the entire contract. I didn't own four other ranches personally but I had an interest in them. I had about 2000 tons of green grapes in the year 1922. I didn't sell the grapes for Camp Five. I hadn't sold a pound. I sold 108 cars all told in 1922. I didn't get refrigerator cars from the railroad company. I got part of them from the railroad company.

#### Cross-Examination

by Mr. Cosgrave. The Witness testified:

I sold and delivered to Kornblum 48 cars. Besides that I loaded four cars more and shipped them back East—4 or 5 cars. Those were the ones he refused. I sold 8 cars to others than Mr. Kornblum. Part of that was Malagas mixed you know. I sold about 5 cars solid Muscats and these were all of the Muscats that I sold other than the ones that were sold to Mr. Kornblum.

#### Re-Direct Examination

by Mr. Conley. The Witness testified:

I never sold 100 cars of grapes of all kinds during the year 1922. I said a moment ago I sold 108 but I couldn't deliver them. I couldn't get the cars to deliver them. In order to tell how many cars I shipped at that season in addition to all I delivered to Mr.

(Testimony of Karl Emerzian.)

Kornblum or offered to deliver to him I would have to look over the bills. I am not interested in five or six different places with five or six different people. I have just one partner. He is with me on Favorita Ranch. 8 cars of grapes were sold from the Favorita ranch, that was all. I owned the Tagus ranch in Tulare County. 7 cars of Muscats were sold from the Tagus ranch to Mr. Kornblum. I sold him 5 cars of Malagas and he took two of them and he didn't take the rest. After he refused to ship the Malagas I shipped them back East. I didn't sell from the Tagus ranch any grapes other than the ones I offered Kornblum except Malagas. I didn't get to exceed 15 refrigerator cars for the Tagus ranch in 1922 and half of that was Malagas. I got about 15 cars for Tagus and about 8 cars at Nevills. The only cars I got in Fresno County was at Nevills Spur from the Southern Pacific Company, was 8 cars—8 or 9, yes. All the cars I got from the Santa Fe Company were got for the Minkler ranch. I sold no cars to anybody else except the cars that were offered to Kornblum. I can't tell offhand the number of cars I got from the Santa Fe Company in Fresno County during 1922 without looking at my bills of lading. The railroad will show it. There is another ranch that I am interested in. It is at Mt. Campbell. I raise all varieties there. I shipped 8 or 9 cars of wine grapes and Malagas from that ranch in 1922. I consigned them to one firm, I forget the name.

I have one brother that is in partnership with me.

(Testimony of Karl Emerzian.)

He had his own ranch. He was ordering cars for his own ranch. I don't know how many cars he ordered for his own ranch. I purchased no cars of Muscats from any body else during that season. I did buy some Muscats off Rankin.

Recross-Examination

by Mr. Cosgrave. The Witness testified:

In explanation of my last answer, Mr. Kornblum came in and wanted to buy some more Muscats and wine grapes from my ranch. I told him what I had I was going to fill my contract with from my ranch and I haven't got any more and he forced me to go and buy some more grapes and I did and he wrote a contract of 7 cars of Zinfandels at \$80 a ton that he bought from me and 2 cars of Alicantes at \$180, 7 cars of Zinfandels at \$150 and 3 cars of Mission or 2, I don't exactly know which, for \$150, and he forced me to go and buy those grapes and I did it because he wanted to buy the grapes. He took a few cars of them and when the price came down he told me he didn't want them and that agreement said if black grapes come down Emerzian should take \$5 a ton less in his own writing and he applied \$3000 on that agreement. That is why I bought the grapes from Rankin. That agreement was made with me the 5th of October.

The season of 1922 was a very short car season.

EXCEPTION NO. 18

Q Do you know generally to what extent or what percentage of contracts such as yours were filled in Fresno County?

(Testimony of Karl Emerzian.)

MR. CONLEY: We object on the ground it is incompetent, irrelevant and immaterial.

. . . . .

THE COURT: Do you mean by that what percentage of cars did you get to meet the demand?

MR. COSGRAVE: Yes; that is it.

A 25%.

MR. MILLER: May we offer another objection? The pleadings here allege they were able and willing to furnish these cars, and what difference does it make?

. . . . .

THE COURT: I will sustain the objection.

. . . . .

MR. COSGRAVE: . . . It is my understanding, if your Honor please, that at the time this answer was drawn that in the first place there would be no question about the change to the 52 cars, but they charge us with a refusal to deliver. We allege that we did not refuse to deliver and I think we are within our rights in showing that we did not refuse to deliver because of this arrangement that was made, or because of the shortage of cars, because that is one of the provisions of the contract "subject to shortage of cars" . . . if there is any question about this we would have to suggest an amendment to our answer so as to cover the point. . . .

THE COURT: I think, Mr. Cosgrave, that



(Testimony of Karl Emerzian.)

your allegation in Paragraph III, where you allege in terms a refusal of the plaintiff to receive any car than the 48 cars is to be construed as being the only excuse that you have for not delivering, that he refused to receive them.

MR. COSGRAVE: That is what I wanted to get at. If that is the view of the Court I would suggest that we will ask leave to make an amendment to it so as to offer on that proposition that there was a shortage of cars. . . .

THE COURT: Coming at this time it is too late to permit an amendment to raise an issue which would be entirely new to the case and in the midst of the trial, and I think the only way discretion could be exercised without abusing it would be to deny the application, and it is so ordered.

The Witness continuing: In reference to the number of cars that I was interested in furnishing to other people, I have definitely in mind the number of cars that I actually did sell or tender to other people other than Mr. Kornblum and it was 7 or 8 cars.

Re-Direct Examination

by Mr. Conley. The Witness testified:

I entered into an agreement with Mr. Kornblum to furnish him additional cars of grapes. Mr. Cosgrave can tell you where that agreement is. . . .

MR. COSGRAVE: We haven't got it. We went over that yesterday, if the Court please, during Mr. Kornblum's examination. He admitted

(Testimony of S. J. Kornblum.)

that there was such a writing, that there was a memorandum described by the witness, but it was not signed by anybody; that it was in Kornblum's hand-writing.

MR. CONLEY: Then that is no agreement, is it? I don't know whether it is or not. It was passed on by the Court yesterday and the same objection was made yesterday and overruled on the ground that the testimony was that a part of the purchase price had been paid.

MR. CONLEY: I am talking about the agreement itself as such without the extraneous testimony showing that it had been partly performed.

MR. COSGRAVE: Yes, and that statement was made yesterday.

The Witness continuing: Some of those grapes were mine and some I bought. I bought Alicantes and 3 cars of Muscats. I was furnishing him all the Muscats I could get cars for.

MR. CONLEY: That is all. That is our case, Your Honor.

### SAMUEL J. KORNBLUM

sworn as a witness for plaintiff, pursuant to the provisions of Section 2055 of the Code of Civil Procedure of the State of California, testified as follows:

I came to Fresno about the time this contract was made in June, 1922, and was here throughout that season. I made no arrangement with Mr. Emerzian about buying these black grapes. He offered every

(Testimony of S. J. Kornblum.)

once in a while a car of grapes that he loaded and we looked at them, and we agreed upon a price and I paid him for such grapes as he offered me right along. I heard Mr. Emerzian's testimony about the slip of paper. I can't recall writing on a piece of paper. I don't remember writing "Emerzian to take \$5 a ton less if the price falls at the time of delivery" on a slip of paper. I don't remember writing anything. I don't remember any agreement with him about 15 cars of black grapes and Muscats too as well. After October 23d Emerzian offered to sell me a car of black grapes. I think it was a car of petit syrahs. I can't remember if Karl Emerzian or Mr. Maljan offered me the bill of lading that you show me on November 8th. There wasn't any grapes offered to me on November 8th. Bill of lading for car No. 14510 Muscat grapes may be one of the cars that was offered to me. This one here is evidently one of the two cars that was advanced, I mean that were tendered to me. I said yesterday afternoon the 29th or 30th of October but it might be two or three days later. The bill of lading of Southern Pacific Company, Car No. 11301 dated November 3d was not offered to me. It is a common custom among shippers to accept bills of lading consigned to the shipper providing that the bill of lading is properly endorsed afterwards. Whenever Mr. Emerzian tendered me a bill of lading that was consigned to him I would not pay him a check unless it was endorsed to me. I don't know whether the bill of lading of the Atchison, Topeka & Santa Fe for Car No. 10466 shipped No-

(Testimony of S. J. Kornblum.)

vember 3d, 1922, was tendered to me or not. I said yesterday that no cars or bills of lading were tendered to me after the two that were tendered on the 29th or 30th of October. Now I say I don't remember whether this particular car was tendered to me or not.

(Witness gave the same testimony with reference to Car AT & SF 12648, 15650 SFRD, Car No. 2291 shipped on October 18th Malagas, Car No. 11701 Petit Syrahs shipped October 20th, Car No. 2589 Malagas shipped October 25th, Car No. 12767 Malagas shipped October 26th.)

The witness continuing: I made statements the first part of the contract that Mr. Emerzian was doing very well in supplying me cars of grapes under the contract. He delivered to me at the rate of three or four a day in the beginning. When the market got to be \$65 he delivered to me a car maybe in three days and I asked him why he didn't deliver he says he can't get no cars. He says "Your contract has no date. Now you just hold your shirt on and you will get your grapes." The car shortage was not unusual. At that time of year the car shortage develops. Of course everybody ships at once. I don't know that the car shortage of 1922 was unprecedented. It occurs every year that people were not getting one-fourth of the number of cars that they want. It occurred this year. I first complained to Karl Emerzian as soon as he stopped giving me the cars. That was as soon as the market went to \$60, then the cars was not to be gotten. He began delivering to me the first of September. He gave me

(Testimony of Karl Emerzian.)

two or three cars on the 4th of September, 2 on the 5th, 3 on the 6th, 2 on the 7th, 1 on the 8th, 9th, 10th, 13th, 14th, 15th, 16th and 19th, 3 on the 20th, 1 on the 21st, on the 23d, on the 25th, 26 and 27th, 2 on the 28th and 1 on the 30th, 1 on the 1st of October, 1 on the 4th, 2 on the 5th and 3 on the 6th, 1 on the 7th, 1 on the 8th, 1 on the 11th, 2 on the 12th, 2 on the 13th, 1 on the 14th, 1 on the 16th, 1 on the 17th and on the 19th and on the 22nd. I didn't know it was impossible for him to deliver me 3 to 5 cars a day throughout the time. There was nothing impossible. People were shipping 25 and 30 a day. I don't know that the only people who shipped 25 a day were the big fruit companies. He didn't give me a fair percentage of cars during that year.

#### KARL EMERZIAN

sworn as a witness in his own behalf, testified as follows:

I started shipping to Mr. Kornblum about the 1st of September. I ordered every three or four days from the Santa Fe and I was trying to get every day all the cars I can to deliver as fast as I can to Mr. Kornblum. As soon as I had one or two or three bills of lading or four or five sometimes I would go to Mr. Kornblum and I would deliver him the bills of lading and he would pay me for them. Once in a while he would inspect the cars. He always asked me how is the car and I would always tell him and he accepted it.

There was a little rain sometime in September that

(Testimony of Karl Emerzian.)

year. I gave him off the Minkler ranch 40 cars the whole season. That is all I could get. I gave him 7 cars from the Tagus ranch the way I agreed. He took those 100 tons of Muscats from the Tagus ranch. The Tagus ranch is on the Southern Pacific. The Minkler ranch is on the Santa Fe. I took Mr. Kornblum out to the Minkler ranch and to Camp Five and I showed him the grapes and we agreed right there that is where he was going to get most of his grapes except 100 tons. I took him to the Nevills ranch and he says he don't want those grapes. Minkler has two ranches, Minkler and Camp Five. One belongs to Emerzian Brothers, the other place to Karl Emerzian. I told him I will sell the K. Emerzian and not Emerzian Brothers and he was satisfied and bought those grapes and that is where I made all my deliveries as fast as I had cars.

Mr. Kornblum never said one word respecting the lack of cars or my failure to deliver grapes until the 23d of October. On October 23d he said "Now the market is shot to pieces and I am not going to take any more grapes. I am going to lose if I take them." Prior to that he never at any time said "Here, you are shipping these grapes to somebody else."

Respecting the black grape contract on the 5th of October, Mr. Kornblum came down to the Minkler ranch and he found me and he wants to get some black grapes and told me what he would pay for them and how many cars he wants. So I told him how much he could buy it for. He says "I will buy so many cars of the different varieties and the different prices, and he

(Testimony of Karl Emerzian.)

says "Have you got any paper?" I say No but I had some bank slips and he took the bank slips and wrote on the back of it, I mean bank checks, and stated that he buys so much black grapes for different prices, also Muscats. He wanted some more Muscats than what I have because his market looks good. He says "I want to get all I can buy" and below he wrote "If black grape market price comes down then Emerzian should take \$5 a ton less." Then I asked him for some money and he says "Karl, why can't you take \$3000 and apply on this contract the money you got off of me of the \$10,000." Then I says "All right, Mr. Kornblum." "Well" he says "When are you going to give me cars?" "Well" I says, "as soon as I can get cars you will get them. I says "you know the car condition." 15 cars were mentioned at that time. I recall the number of the different varieties. It was 2 Alicantes, 3 Missions, 7 Zinfandels and 3 Muscats. The figures spoken of was Alicantes \$180, Missions \$150, Zinfandels I think was \$140 or \$130. I don't exactly know which and the Muscats \$80. I gave that memorandum to you, Mr. Cosgrave, and don't know where it is at the present time. It was a half of a bank slip and I have not seen it since about a year ago. It was entirely in Kornblum's handwriting.

I got those grapes for Mr. Kornblum and gave him 3 or 4 cars out of the 15. I loaded cars and offered them to him and he refused to take them. According to our agreement I was to get these as soon as I can

(Testimony of Karl Emerzian.)

get cars. He says "We have got plenty of time, any time, just so you give them to me." I loaded 4 and he refused to take them. After that I turned them over to Pete Maljan and says "Sell them wherever you can sell them to the best advantage." I couldn't give the grapes away so I turned them over to Mr. Maljan and I says "See what you can get out of these cars." I don't know where he shipped them. He has got the figures for them. They were 1 of petit syrahs, 2 of Missions and 1 of Zinfandel. I made no tender of the remainder because he refused to take them every time I got a bill of lading so I got tired of it. He says "I don't want to have anything to do with them. The market is gone, I am done." This took place after the 26th of October.

I never made any statements to Mr. Kornblum on the 18th that I would not deliver any further cars to him. He was anxious to know how many cars I can give him. I told him, "Mr. Kornblum, you know the car condition." "I had 4 or 5 cars ordered and some days I don't get any, for two days I don't get any, but as fast as I have cars you will get all the grapes I have on the ranch to give you. It is too late to dry them and I will give them to you as fast as I can get the cars from the Santa Fe." It was pretty close to 500 tons on the Minkler ranch at that time. I could have given him box cars but he didn't want them. I didn't sell any of the grapes on the Minkler ranch to anybody else. From my individual ranch that season I never sold any grapes but to Mr. Kornblum. I am



(Testimony of Karl Emerzian.)

interested in 4 ranches with my brother, the La Favorita, the Biola, The Tagus and Mt. Campbell. One ranch has 100 acres of Muscats and another ranch has 140 acres of Muscats and the Tagus has 40 acres of Muscats, 280 acres of Muscats all told. The fourth ranch has no Muscats. My brother and I sold 8 cars to persons other than Mr. Kornblum and part of that was Malagas, mixed. It would make about 5 or 5½ cars of Muscats. Mr. Kornblum knew that we sold these 8 cars. He knew that was not his grapes at all. He never made any objection. He bought one car himself off of that vineyard through Pete Maljan. Then as soon as the 23d begins, he refuses to take the bill of lading from Mr. Maljan.

The facts are that I sold no Muscat grapes from my own vineyard that I owned individually to anybody other than Mr. Kornblum. From the other ranches, being a total of 280 acres of Muscats, that I owned in association with my brother, I sold a total of 8 cars about 5 of which were Muscats.

4 bills of lading for Muscats were tendered to Mr. Kornblum of grapes from the Minkler ranch after October 26th. They are car No. R. D. 12648, 14510, 10328 and 10466. When I offered these to Mr. Kornblum he refused to take them and said "The market is no good, I am going to lose money and I don't want them." That is the only reason he gave.

My son was in charge of the picking of grapes at the Minkler vineyard. His name is Ed. Emerzian. On this Minkler ranch the vines are 3 feet high from the

(Testimony of Karl Emerzian.)

ground. You don't see many of those in the country. I bought these from the wine association and they were 3 feet high. They were originally planted for wine grapes. The ordinary Muscat vine is low and the grapes are low. On the kind of vines I have described the grapes would hang a couple of feet from the ground. I couldn't see any damage on those grapes at all from the rains. They were fit for Eastern shipment at that time. Even if a bill of lading is made to me in case I sell it I go to the railroad company and divert the cars to whoever I give them to and sign my signature. That is the custom of the trade. There is nothing in question about it or difficulty.

#### Cross-Examination

The Witness testified: The cars of grapes that he refused were not damaged by rain. They were fit for Eastern market. I considered them sound, first-class grapes. They were all alike. There was no difference in them. Grapes that I offered him afterwards were the same kind of grapes that I offered him on the 27th and 28th. They were not damaged at all. They looked all about alike. They were merchantable grapes, I am certain about that.

The conversation about the written memoranda occurred on October 5th or 6th. The memorandum was dated at the bottom. I can't tell for sure. The memorandum said so many cars of grapes for so much price and stating the cars and prices, also if the price of black grapes go down Mr. Emerzian should take \$5 a ton less for the black grapes. I didn't sign it and Mr. Kornblum didn't sign it. He wrote it. It was in

(Testimony of Karl Emerzian.)

his own writing. He agreed that I should transfer \$3000 from the Muscat money advanced to the black grapes. That was not on the memorandum. There were 2 cars of Alicantes on that, next 7 cars of Zinfandels if I am not mistaken there were 3 cars of Missions and 3 cars of Muscats. Missions and Petit Syrahs are called the same thing. We both agreed on the price. The price of Alicantes was \$180, of Missions \$150, Zinfandels \$130 or \$140. I don't know what the market value was at that time. It varies. After the 26th you couldn't give them away. Up to the 26th I don't know what the price was, what they were worth. Notwithstanding Kornblum had 70 cars of Muscats coming under his contract, on October 5th he entered into a contract with me to take additional cars of Muscats at \$80 a ton. He told me if I can get more he will buy them. I was going to give him all I had and did give him all I could get cars for. He told me if I could get more Muscats at \$80 than the contract, he will buy them. At that time my brother's grapes were on the trays all of them. At the time Mr. Kornblum breached his contract, I had 500 tons of Muscat grapes that I could deliver him. I kept them for my contract. He came and asked me and says he wants to buy more Muscats and I went and bought them elsewhere for him and gave them to him at \$80 a ton. I bought it from a Japanese because I just had enough to fill my contract of the 100 cars. The balance on my own ranch at Camp Five.

(Testimony of Karl Emerzian.)

Mr. Kornblum never said to me "Well, now, I want you to relieve me from this contract." He asked me how many more cars I can get. I says "All the cars I can get from the railroad I will fill and give them to you." He says "Are you sure you can give me 15?" "Well" I says "I can give you 15 and more when I can get cars."

When I first entered into the contract, I took him all around to these different vineyards and finally went out to the Minkler ranch and to Camp Five and said "Now Emerzian Brothers own this other place but this is mine and I am going to give you the grapes right from here" and we agreed upon it then, that all the grapes he was going to get were to come from Camp Five and from the Tagus ranch 100 tons, that means about 6 or 7 or 8 cars. I completed my contract with him as far as the Tagus ranch was concerned. It was the distinct understanding with him that the balance of the grapes were to come from Camp Five, Minkler ranch. I never made any suggestion at the time that he incorporated in that contract that these grapes were to be taken from the Minkler ranch, there was no such thing talked. He was anxious to know how many cars I can give him right away. I told him as soon as I get reefers and ice cars I will give them to him. He says "Can you give me 15?" I said "Mr. Kornblum, I will give you 15 and more. I will give you all the railroad company will furnish me cars for." He says "If I know you are going to give me 15 cars sure, all right." "Well." I says, "I am going to give you!

(Testimony of Peter Maljan.)

all." I says "Why do you want to make a contract for the 15, you are getting every pound of grapes coming off of that ranch and you will get them." I never sold a bunch to anybody. He was anxious to put in 15 cars and make me sign it. I didn't say that he wanted to get out of his contract. I don't know what was his idea. He says "Are you sure you can give me the 15 cars in a short time?" I says "If the railroad company gives me the cars I will give them to you." He never said a word about 90, 80, 60 or 50. He wanted to put in 15 cars and I says "No, I wont sign any contract like that." I says, "I am going to give you 15 and all I got on the Minkler ranch as soon as I get cars to load them."

At the time I presented the bills of lading I didn't know that Kornblum had made a demand on me for \$25,000 and for the return of the deposit. I never got any letters from Mr. Schary asking why I was not making deliveries. I took out the bills of lading on November 1st and 2nd in the name of Emerzian because Mr. Kornblum refused to take them. I billed them to him after he refused to take them because I might have thought he will take them. On the ranch at Biola I raise 160 acres of Thompson seedless, a few figs and some apricots. I put in an order for a car at Biola and I didn't get it for the Thompsons.

#### PETER MALJAN

sworn as a witness for defendant, testified as follows:

My name is Peter Maljan. I was broker for Mr. Emerzian in 1922. Respecting the bills of lading for

(Testimony of Peter Maljan.)

cars delivered at Minkler on November 2, November 3, November 5 and November 8, Car No. 12648 on November 2nd was consigned to Steinhart & Kelly of New York. It brought red ink, \$46.50 less than the freight. It was sold on consignment but didn't bring the freight charges. Car No. 10466, November 3d, went to New York to Steinhart & Kelly and there was received for that car \$152.95. 14510 was sold in Philadelphia by A. Cancelmo. It was billed there but it was diverted later from there to New York and it was finally sold in New York by Steinhart & Kelly and it netted \$17.80. The car grossed \$980. Car 10328 on November 8th was consigned to Sweeney-Lyons, Boston. It was sold at 78 cents a box and netted \$120.46. Car 11701 from Minkler went to New York and it was handled by Steinhart & Kelly and grossed \$1632.00. It netted \$685.32. Car 15650 is Zinfandel from Minkler, sold by A. Cancelmo, Philadelphia, and received \$821.44 net for the car. It was billed out on October 28th.

(Defendant now offered in evidence his schedule of deliveries admitted by Mr. Kornblum in his examination and the same was marked "Exhibit H" and is in words and figures as follows:

| Date  | From    | To          | Car | No.   | Bxs.  | Weight   | Muscats  | Malaga   | Mission | Petit Seriat | Alicant |
|-------|---------|-------------|-----|-------|-------|----------|----------|----------|---------|--------------|---------|
| 9/2   | Minkler | N Y         | R D | #3365 | 1048  | 24193#   | 604.32   |          |         |              |         |
| 4     | "       | Jersey City | " " | 10489 | 1096  | 30688    | 777.20   |          |         |              |         |
| 4     | "       | " "         | " " | 10701 | 1088  | 28512    | 712.80   |          |         |              |         |
| 4     | "       | " "         | " " | 9057  | 1088  | 27361    | 684.02   |          |         |              |         |
| 5     | "       | " "         | " " | 6314  | 1056  | 26399    | 659.97   |          |         |              |         |
| 5     | "       | " "         | " " | 8121  | 1096  | 27389    | 684.72   |          |         |              |         |
| 6     | "       | " "         | " " | 3934  | 1056  | 26358    | 658.95   |          |         |              |         |
| 6     | "       | " "         | " " | 9229  | 1088  | 26859    | 671.47   |          |         |              |         |
| 6     | "       | " "         | " " | 10842 | 1088  | 27055    | 676.37   |          |         |              |         |
| 7     | "       | " "         | " " | 10845 | 1096  | 27606    | 690.15   |          |         |              |         |
| 7     | "       | " "         | " " | 7731  | 1088  | 27268    | 681.70   |          |         |              |         |
| 8     | "       | " "         | " " | 16715 | 1088  | 29145    | 746.12   |          |         |              |         |
| 9     | "       | " "         | " " | 7164  | 1188  | 32224    | 805.50   |          |         |              |         |
| 10    | "       | " "         | " " | 15352 | 1224  | 32225    | 805.62   |          |         |              |         |
| 13    | "       | " "         | " " | 9289  | 1224  | 32502    | 812.55   |          |         |              |         |
| 14    | "       | " "         | " " | 17091 | 1224  | 30892    | 772.30   |          |         |              |         |
| 15    | "       | " "         | " " | 14263 | 1224  | 33331    | 833.27   |          |         |              |         |
| 16    | "       | " "         | " " | 12253 | 1224  | 32666    | 816.65   |          |         |              |         |
| 19    | "       | " "         | " " | 7934  | 1233  | 32430    | 810. . . |          |         |              |         |
| 20    | Tagus   | " "         | PFE | 124   | 1221  | 28627    | 715.67   |          |         |              |         |
| 20    | Minkler | " "         | R D | 13066 | 1224  | 32156    | 803.90   |          |         |              |         |
| 20    | "       | " "         | " " | 6689  | 1056  | 27737    | 693.42   |          |         |              |         |
| 21    | "       | " "         | " " | 6668  | 1056  | 28196    | 703.12   |          |         |              |         |
| 23    | "       | " "         | " " | 15170 | 1224  | 33545    | 838.62   |          |         |              |         |
|       | Tagus   | " "         | PFE | 5330  | 1233  | 25610    | 630.25   |          |         |              |         |
| 25    | Minkler | " "         | R D | 9410  | 1233  | 32866    | 821.65   |          |         |              |         |
| 26    | "       | " "         | " " | 10522 | 1224  | 32622    | 816.55   |          |         |              |         |
| 27    | "       | " "         | " " | 8889  | 1224  | 33158    | 828.95   |          |         |              |         |
| 28    | "       | " "         | " " | 7185  | 1316  | 35354    | 883.85   |          |         |              |         |
| 28    | "       | " "         | " " | 7411  | 1224  | 33293    | 832.30   |          |         |              |         |
| 30    | "       | " "         | " " | 7898  | 1359  | 36069    | 901.72   |          |         |              |         |
| Oct 1 | Tagus   | " "         | PFE | 10844 | 1233  | 32959    | 823.97   |          |         |              |         |
| 5     | "       | " "         | " " | 4196  | 1367  | 38675    | 966.87   |          |         |              |         |
| 6     | "       | " "         | " " | 17801 | 1233  | 27782    |          | 1319 64  |         |              |         |
| 6     | Minkler | " "         | R D | 16542 | 1360  | 34490    |          |          | 2586 75 |              |         |
| 4     | "       | " "         | " " | 6359  | 1320  | 35085    | 877.12   |          |         |              |         |
| 6     | "       | " "         | " " | 10106 | 1360  | 36650    | 916.25   |          |         |              |         |
| 5     | "       | " "         | " " | 7403  | 1360  | 36375    | 909.37   |          |         |              |         |
| 7     | "       | " "         | " " | 6285  | 1360  | 36590    | 914.75   |          |         |              |         |
| 8     | Tagus   | " "         | PFE | 2541  | 1357  | 33226    | 830.65   |          |         |              |         |
| 11    | Minkler | " "         | R D | 16618 | 1360  | 35600    | 890. . . |          |         |              |         |
| 12    | Tagus   | " "         | PFE | 10794 | 1367  | 31516    | 787.96   |          |         |              |         |
| 12    | Minkler | " "         | R D | 6328  | 1320  | 39399    |          |          | 2954 92 |              |         |
| 3     | "       | " "         | " " | 8831  | 1360  | 35995    | 899.87   |          |         |              |         |
| 13    | Tagus   | " "         | PFE | 9888  | 1224  | 23282    | 572.05   |          |         |              |         |
| 13    | Minkler | " "         | R D | 13353 | 1360  | 36792    |          |          |         | 2694 40      |         |
| 14    | "       | " "         | " " | 11809 | 1361  | 35860    | 896.50   |          |         |              |         |
| 16    | "       | " "         | " " | 12731 | 1360  | 35500    | 887.50   |          |         |              |         |
| 19    | "       | " "         | " " | 15434 | 1360  | 35980    | 899.50   |          |         |              |         |
| 22    | "       | " "         | " " | 12352 | 1360  | 35410    | 885.25   |          |         |              |         |
| 26    | "       | " "         | " " | 7946  | 1360  | 34790    | 800. . . | Not paid |         |              |         |
| 17    | "       | " "         | " " | 17030 | 1360  | 34697    |          |          |         |              |         |
|       |         |             |     |       | 64213 | 1661349# | 37131 29 | 1319 64  | 5541 67 | 2694 40      | 3122 73 |





(Testimony of Peter Maljan.)

This record is short one car load of Muscats. )

The Witness continuing: I don't know anything of an agreement between Mr. Kornblum and Mr. Emerzian for the purchase of black grapes. I do remember a little slip with a memoranda on it. It was in Mr. Kornblum's handwriting. I didn't see him write it. It was on a piece of paper. There was written so many Alicantes I think it was 1, 2 or 3 and so many Zinfandels and giving the price and so many Missions. There were two or three Missions at \$150, Alicantes \$180 and Muscats \$80, 3 cars of Muscats, and underneath was written on it also if the market comes down he would agree to take \$5 less a ton. That was all in Mr. Kornblum's handwriting. I recognized it. I didn't hear him and Karl Emerzian discuss it.

There was a very bad car shortage during the season 1922. It is pretty hard to state just exactly what percentage but some days and day after day we couldn't get a car. There was a bad car shortage and a great many grapes rotted on the platform during that season and people were threatening to bring suits against the railroad company for failure to furnish cars. The shortage was most acute in the latter part of September and October and was quite acute about the middle of October. A great many people used box cars instead of reefers. That season you couldn't sell the grapes unless you could get a car to load them in. I had a great deal to do with Mr. Kornblum that season. I don't just remember hearing him complain to Mr. Emerzian about Emerzian failing to give him cars.

(Testimony of Peter Maljan.)

Cross-Examination

The Witness testified: The car shortage became acute between the first and middle of October. There was car shortage along about the 15th and on the 18th of October. There was no car shortage early in September. Muscats ordinarily get ripe in September and can be picked all at once if a fellow wants to pick them that way. I remember the first part of November offering Mr. Kornblum two bills of lading for Muscats. He said he didn't want them. He said the quality wasn't good enough. I didn't see these particular grapes. I never tendered Mr. Kornblum any further bills of lading. Up to the time these 2 cars were refused, Mr. Kornblum had refused to accept another car of Muscats and Malagas mixed but had not refused a straight car of Muscats. I didn't tender all of the bills of lading that had been delivered under this contract for Muscat grapes. Some I did and some Mr. Emerzian did. It didn't make much difference. Some of them I got the checks for and some of them he got himself. He went to the room sometimes. Most all of the invoices were made out and delivered by me to Mr. Kornblum. I do remember of one, I think, that was not. All but two are in my handwriting. My main office at that time was with Mr. Emerzian. I had another office in my room at the hotel. Mr. Emerzian showed me the little memorandum or small piece of paper. We had an argument and that is why he showed it to me. These figures and names of the grapes was all that was on it and there was a writing

(Testimony of Peter Maljan.)

about the \$5. I don't remember whether there were any other words.

. Re-direct Examination

The Witness testified: In reference to the car partly of Malagas and partly of Muscats from La Favorita that Mr. Kornblum refused, I will tell you. The car was loaded on the 18th. I came to Kornblum and said there is a car to be loaded at La Favorita. There is muscats and malagas mixed. I says "Do you want to buy this car?" Mr. Kornblum says "How much?" I told him \$77.50, I think. Then he says "No, I will give you \$75." He never saw the car. I says "All right, you bought the car at \$75 a ton." It was mostly Muscats. The car was loaded on the 18th and naturally in this case Mr. Emerzian didn't get the bill of lading until three or four days afterwards. There is no agent there and no depot. He gave me two bills of lading, one was that bill and one was petit syrahs, and asked me to collect from Mr. Kornblum. So he was standing right before the Sequoia Hotel. He looked at it and he says "I didn't buy no petit syrahs." This was about the 23d or maybe the 22nd. I took the matter up with Mr. Emerzian and he says "Yes he bought it, he had a contract with me and he bought more other black grapes" and that is the time he showed me that paper. The next day Emerzian and I were talking to one another and Mr. Kornblum came out and they had considerable trouble between them. Finally Kornblum says "All right, I will give you \$125 for these petit syrahs and \$60 for the other." This was on the 22nd or 23d.

(Testimony of Dick Klemian.)

DICK KLEMIAN

sworn as a witness for defendant, testified as follows:

My name is Dick Klemian. I reside in Fresno. I have seen Mr. Kornblum and don't know him personally. I was employed by Karl Emerzian in 1922 driving a tractor. About the middle of October I heard a conversation between Mr. Emerzian and Mr. Kornblum on the K Emerzian ranch in the neighborhood of Minkler. I heard Mr. Emerzian and Mr. Kornblum talk something about buying black grapes and Mr. Kornblum asked Karl Emerzian to buy him black grapes. Mr. Emerzian asked him \$3000 cash to buy black grapes and Mr. Kornblum had told Mr. Karl Emerzian to carry the \$3000 from that \$10,000 as cash for the black grapes.

Cross-Examination

The Witness testified: That was all I heard. They were not talking before that. I was waiting for Mr. Emerzian to come over there because I wanted some money and when I heard them talk about this deal I didn't want to interfere. So I stood there by the machine until they got through talking. I didn't hear any other talk at that time except what I have related. Mr. Kornblum came up with Mr. Emerzian riding in the machine with him. I was right by the running board. They were talking about buying some black grapes. Mr. Kornblum said he wanted Mr. Emerzian to buy him black grapes. Emerzian said he wanted \$3000 in cash. Mr. Emerzian said he would buy them if he

(Testimony of V. Tarjanian.)

give him \$3000 in cash. He didn't tell him any certain kind, some Alicante Bouchet I think he wanted. He didn't said Alicante Bouchet, he said black. He didn't say anything about Muscat grapes. That wasn't mentioned. All I heard was black grapes and I don't know what kind of black grapes he meant. I don't know whether any memorandum was written between them at that time. I didn't see Kornblum have any piece of paper in his hand. I could see them both sitting there together. Emerzian then said he wanted \$3000 before he would tackle any black grapes.

#### V. TARJANIAN

sworn as a witness on behalf of defendant, testified as follows:

My name is V. Tarjanian. I live in Sanger and was employed on Karl Emerzian ranch in Minkler in 1922 hauling Muscat grapes. Towards the end of October, 1922, they were good grapes. A little rain had come but they were not spoiled. The vines that the grapes grew on were big vines up pretty high about 2 feet or 3 feet high. I hauled ten or fifteen days after the end of October I guess. They looked to me good grapes. There was some bad stuff or wet stuff I was hauling for the Sanger Winery—some red stuff that was on the platform and some parts of the ranch. Mr. Emerzian told me to take them to the Sanger Winery.

#### Cross-Examination

The Witness testified: The wet stuff that I hauled was pretty wet. That wet stuff was the top boxes.

(Testimony of C. Tarzian.)

You see they stack them about 8 boxes high and there comes a rain and the top ones get it and Mr. Emerzian told me to take them to the Sanger winery. I took about 300 boxes, some from the ranch and some from the platform. The boxes I took to the winery were wet. As to whether they were rotten I didn't examine them. There was not much rain out there. Sometimes it would be two or three minutes and then stop and then come a little more about two minutes more—a little shower or something like that. I was there on the 27th of October hauling grapes. It rained that day just a little bit. I don't know how many hours. It rained and stopped and then come again. It rained just a little bit on the 28th. I don't know whether it rained on the 1st of November. Some days a little rain come but I don't know whether the 28th or 29th or 30th. There was no frost there at that time. I was not over there when there was any frost.

I ate a lot of those grapes every day. I ate the wet ones and dry ones too. They tasted to me just the same. They looked to me just the same.

#### C. TARZIAN

sworn as a witness on behalf of defendant, testified as follows:

My name is C. Tarzian. I was loading the grapes at the Minkler ranch in October, 1922. I worked there from October 3d to November 11th. They were Muscat grapes and were not damaged in any way. Along about the 26th and 27th of October the grapes were not injured by rain. They were good grapes.

(Testimony of J. H. Barker.)

Cross-Examination

There was a little rain out there. It didn't wet the grapes. There was some water on the grapes on the platform but not very much. There were some boxes with rain on them. They were rained on in the vineyard. Some of these grapes were taken from the platform over to the winery because they were wet. None of them in the car had been rained on. I put them in. Not a single box had been rained on that was put in there. I picked them out before they were put in there. I don't know what day they were picked. The rain had taken place before those grapes that I put in the car were picked.

Re-direct Examination

In saying they were not damaged I don't mean to say they were not rained on. The foliage on the vines was heavy foliage. The grapes that were on the vines were not damaged by the rain. The grapes I was talking about were picked in boxes and exposed. I don't know how long they were in boxes before they were sent to the winery.

J. H. BARKER

sworn as a witness on behalf of defendant, testified as follows:

My name is J. H. Barker. I have lived in Fresno County about 15 years and am now and was in 1922 agent for the Pioneer Fruit Company and was operating in Reedley and in Minkler. I noticed the shipments from the Karl Emerzian vineyard in 1922. I

(Testimony of J. H. Barker.)

was superintending the shipping from the same station where Mr. Emerzian was shipping to Mr. Kornblum. I never saw Mr. Kornblum down there. I noticed some of the grapes shipped in the Kornblum shipments. I remember when there was a little rain in that section and saw some of the shipments after that. The stuff of Mr. Emerzian that I saw was just as good as any of the rest of the stuff that was being shipped. It was the same as the fruit we were shipping and we got state inspection on the fruit we were shipping which was sold f.o.b. and paid for. From my independent knowledge of the business, I would say that whether it was of high-class shipping quality or not all depends on what they are going to use it for. Generally, for general market purposes we shipped our stuff right straight through to the East on f.o.b. orders and it was accepted and paid for.

#### Cross-Examination

I have been in the business twenty years and was born in Tennessee and have been working for companies that are in the business. Sometimes Muscats and Malagas deteriorate after having been rained on and sometimes they don't. Naturally any kind of fruit Malagas or Muscats, deteriorate when they come in contact with rain. Whether or not they are as fit after a heavy rainstorm as they would have been if there had been no rain depends. Supposing it rains for a couple of hours hard and the sun comes out and dries out the vines, your grapes are not hurt very much. They are not benefitted.



(Testimony of Geo. Hensley.)

From my twenty years experience I have found that when it rains on our Muscats and Malagas and it is succeeded by heavy frosts for four or five days that the grape itself is useless for shipping purposes. After it freezes them up and kills them. After there is a rain and they are frozen or killed and burned up they are not fit for much of anything.

Re-direct Examination

I would generally go out to the district every forenoon and every afternoon. I think it was about the 4th or 5th of November that there was a frost. There was no frost noticeable before that.

GEO. HENSLEY

sworn as a witness on behalf of defendant, testified as follows:

I live in Fresno and am manager of the Minkler Fruit Growers Association and have been since 1920. I was such in 1922. The association is made up of grape growers in the Minkler neighborhood. I live there most of the time and stay there during the busy season. I was there in all of October, 1922. I know the Muscat vineyard of Mr. Emerzian. He is not a member of our association. I couldn't say about all of his vines. There are some high vines but I have never been all over the place.

Respecting rain damage in 1922, we shipped fruit during November up to and until the 30th of November when we shipped our last car. Some of the fruit was rain damaged and some wasn't. The locality

(Testimony of Karl Emerzian.)

made some difference. We sorted ours out at the house and we picked out the damaged fruit and packed the good fruit. The foliage of the vines makes a difference in the extent of rain damage. We shipped straight along through October and November. We sorted all of the grapes after the 1st of November and sorted some all through the season. We shipped some of what we call juice grapes. They are bought for juice purposes. These we did not sort out. They were the vineyard run. I would say that the grapes we shipped of vineyard run were suitable for shipment.

#### Cross-Examination

They were suitable for juice. That's what we sold them for. We shipped lots of them to the Eastern market. We have table grapes and then we have juice grapes and the table grapes we either sort in the field or else we sort them in the packing house. The fact that rains had come, it is not true that the only reason we sorted them was because rains had come and made it absolutely necessary. We sorted them all the season and sorted just the same after the rain as before.

Here defendant rested.

#### KARL EMERZIAN

recalled as a witness for plaintiff, pursuant to the provisions of Section 2055 of the Code of Civil Procedure of the State of California, testified as follows:

At the time that I offered the bills of lading for 4 cars to Kornblum; the cars were rolling in his name.

(Testimony of S. J. Kornblum.)

Cross-Examination

by Mr. Cosgrave. The witness testified:

The others were the same way. I rolled them before he pays me.

SAMUEL J. KORNBLUM

recalled as a witness on behalf of plaintiff in rebuttal, testified as follows:

I never at any time entered into any agreement or understanding or made any statement to Mr. Emerzian that he would take \$3000 off the \$10,000 on deposit and apply it on a new and independent contract. I never agreed to take from Emerzian any cars that I refused to take up to the 27th of October, 1922. I never refused any until they were rain damaged.

It is hereby stipulated by and between the parties to this action that the foregoing bill of exceptions is correct in all respects and that the same may be approved, allowed and settled and made a part of the record herein to be used by the defendant upon his writ of error to the Circuit Court of Appeals.

Dated this October 1st, 1924.

Edward Schary

Kenton A. Miller

Lindsay and Conley

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Attorneys for Plaintiff

L. B. Hayhurst & Geo. Cosgrave

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Attorneys for Defendant

The foregoing bill of exceptions is hereby allowed and settled as correct in all respects and made a part of the record herein to be used upon writ of error to the Circuit Court of Appeals.

Dated this October 10," 1924.

Wm P James

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Judge

Settled, allowed, signed and filed this 15 day of October, 1924.

Chas N. Williams

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Clerk

By R S Zimmerman

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Deputy Clerk

[Endorsed]: No. 152 Civil IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division S. J. KORNBLUM etc. Plaintiff vs. KARL EMERZIAN Defendant. (Engrossed) BILL OF EXCEPTIONS FILED OCT 15 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk. L. B. HAYHURST GEO COSGRAVE MATTEI BLDG. FRESNO, CALIF. ATTORNEY-AT-LAW for defendant

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IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

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|                             |   |                |
|-----------------------------|---|----------------|
| S. J. and WILLIAM KORNBLUM, | ) | Civil No. 152. |
| a corporation,              | ) |                |
|                             | ) | Plaintiff,     |
|                             | ) |                |
| vs.                         | ) | OPINION.       |
| KARL EMERZIAN,              | ) | -----          |
|                             | ) | Defendant.     |
|                             | ) |                |

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Edward Schary; Lindsey & Conley; K. A. Miller: Attorneys for Plaintiff.

L. B. Hayhurst; Geo. Cosgrave: Attorneys for Defendant.

.....

Plaintiff sues to recover damages for the alleged failure of defendant to deliver fifty-two carloads of muscat grapes during the season of 1922, including the unused remainder of deposit money. A contract in writing was made on the 20th of June of that year, at Fresno, California, which recited that plaintiff, a corporation, agreed to buy, and defendant agreed to sell, one hundred cars of muscat grapes at Fifty Dollars per ton, loaded in refrigerator cars. Other conditions of the contract are not in dispute; hence they need not be particularly set out.

Pursuant to a condition of the contract, the plaintiff advanced \$10,000 to the defendant, from which

deposit \$100 was to be deducted for each carload of grapes delivered, and the balance of the agreed price of each carload was to be paid by the plaintiff on delivery of the bill of lading. The deliveries of grapes began the 1st of September, 1922, and continued up to about the 22nd of October, at which time forty-eight cars in all had been delivered and were paid for. Deliveries were made of approximately the same number of cars per week throughout the entire period. For instance, from the 1st to the 10th of September the average delivery was one and two-fifths cars per day; from the 10th to the 20th of September, four-fifths cars per day; or an average for the first twenty days in September of one and one-tenth cars per day. From the 20th of September to the 10th of October the average was nine-tenths cars per day. The market price—that is, the wholesale price—of grapes at and about Fresno, of the kind and quality, and delivered under like conditions as specified in the contract between the plaintiff and defendant, varied considerably from September 1st to October 23rd. There was not a great difference in the testimony on this point—that of S. J. Kornblum, for plaintiff, agreeing in the main with that of other witnesses. From that testimony the following average prices may be calculated:

|                                     |                  |
|-------------------------------------|------------------|
| From September 1st to 10th,         | \$38.70 per ton; |
| From September 10th to 20th,        | \$56.25 per ton; |
| From September 20th to October 1st, | \$67.50 per ton; |
| From October 1st to October 10th,   | \$76.25 per ton; |
| From October 10th to October 15th,  | \$77.50 per ton; |

From October 15th to October 18th, \$86.25 per ton. The average price covering the whole period during which deliveries were made was \$67 per ton. One witness testified that he knew of a single car that sold as high as \$100 per ton, but this seems to have been a case of an isolated single sale, which should not be considered in ascertaining the general market price. The contract contained a condition that the seller would not be responsible for deliveries "in the event of strikes or car shortage", but as the defendant has not pleaded as excuse for non-delivery a shortage of available cars, it must be assumed that sufficient cars could have been obtained to have shipped all of the grapes required to be delivered under the contract during the 1922 season. The contract was made for that season and it must be assumed that it was made with full knowledge of climatic conditions and with an understanding as to possible damage that grape crops might suffer because of a change in weather conditions. The defendant did not protect himself against any shortage of fruit which might be occasioned by damage done by the elements, but agreed unconditionally to deliver one hundred cars of grapes suitable for eastern shipment, which required that the fruit be of thoroughly sound condition. His defense is that, notwithstanding that he had the grapes and was ready to deliver them, the plaintiff refused to accept more deliveries after about October 22nd. The evidence satisfactorily establishes that in the locality where the grapes were produced a general rainstorm occurred on October 27th, when rain fell to the

amount of over one-half of an inch, and that the condition of all muscat grapes in the fields was affected so as to make the fruit unsuitable for eastern shipment. All of the tenders of cars of grapes shown to have been made by the defendant, occurred after this storm of the 27th, and it must be concluded that plaintiff was justified in refusing all offered deliveries of grapes after that date. Plaintiff testified that he was constantly asking for faster deliveries after the time that defendant commenced to deliver under his contract, and that the defendant insisted that his contract did not require any specified quantity at any particular time. It appears that the plaintiff bought from other persons and at higher prices the same class of grapes during the same season, which tends to corroborate his statement that he was urging that deliveries be made in larger quantities by the defendant.

It has already been noted that the defendant contracted with the presumed knowledge of the length of the shipping season. The likelihood of rain occurring in October was therefore a thing that he had notice of, and if he chose to delay his shipments until the time of the year had arrived when damage was likely to be caused by rain, he took the risk of having to make the buyer whole for damage suffered by failure of deliveries for that cause. It must be assumed that, as the buyer was ready to receive and pay for the grapes as fast as they could be delivered, plaintiff might have made full delivery under his contract before any rain fell. Defendant has insisted that, as it was shown that there was a sudden drop in the grape



market on October 23rd, plaintiff's real reason for rejecting the grapes was because of the unstable condition of the market rather than that the grapes were not of good quality. No definite reason has been given in the testimony to show why the eastern market for grapes suddenly fell off on October 23rd. It is as reasonable to conclude, as to assume anything different, that that was due to the fact that the rainy season was approaching and Eastern buyers were not willing to run the risk of purchasing damaged grapes, for on October 2nd there had been a shower of rain in Fresno County.

All of the evidence considered, with the attending circumstances, I am of the opinion that the state of facts as represented by the plaintiff's testimony is supported by more corroboration than is that of the defendant. In that view it might be here concluded that plaintiff is entitled to judgment, were it not for the fact that defendant claims that the original contract was modified so that he was required only to deliver fifteen cars in addition to the forty-eight which the plaintiff received. He asserts also a counterclaim under which he charges that the plaintiff agreed to buy separately several cars of other varieties of grapes, and alleges that plaintiff agreed that \$3,000 of the deposit money should be applied on account of that purchase. As to the counter-claim the evidence does not satisfy me that the contract as alleged therein was entered into.

The alleged modification of the contract was in the form of a written memorandum and was made on October 18th. That writing was as follows:

"I hereby agree to accept on the one hundred cars muscats to be loaded in refrigerators as per contract. Up to present time he, K. Emerzian, already delivered 45 car. K. Emerzian agrees to deliver 15 more cars anyhow, or if there is more on Minkler Ranch Camp Six he must give to me or deliver."

I do not think either that any consideration is shown to have been rendered for the execution of this alleged contract, and, further, that assuming it to be valid and binding, it did not relieve the defendant from furnishing the grapes required under the original contract, for he had the duty to furnish at least all of the grapes that were on the Minkler Ranch and he admitted in his testimony that there were plenty of grapes remaining on that ranch at the time the rain came. To remark again, no excuse is offered for non-delivery based on the ground of shortage of grapes or shortage of cars. However, on the question of consideration, I do not think that there could have been one to support this second agreement, unless the specification that the grapes should be delivered from the Minkler Ranch furnished it. The defendant, however, testified that from the beginning it was contemplated in the main that the Minkler Ranch grapes would be those used in filling the contract requirements. Referring to the preliminary negotiations had at the time of the making of the first contract, defendant testified that he showed Kornblum different ranches and stated: "I took Kornblum to Minkler and we agreed that there was where he

wanted his grapes." So, if this testimony of the defendant is true, the reference to Minkler in the second memorandum added nothing to the general understanding that was had at the time the first contract was made. But to again repeat: This supplemental agreement did not relieve the defendant from delivering the full amount of the grapes required under the terms of the first contract—if he had them—and according to his own testimony he did have them in sufficient quantity to fully perform his obligation.

The rule of damages is, I think, correctly stated by plaintiff's counsel to be that expressed in Sections 3308, 3309, Civil Code of California (See also Vol. 24, Ruling Case Law, page 72, on general subject); that is, damages would be the excess of the value of the grapes to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled. I think that under a contract of the kind here considered, where deliveries were to be made from day to day covering a fruit season, the value to the buyer would not be expressed by the high price that might have been obtained for a single car of fruit during the period, but that an average price should be adopted. The cars contained an average each of fifteen tons. The fifty-two cars as to which the defendant was short in his deliveries would have contained 780 tons. The difference between the price agreed to be paid, to-wit, \$50 per ton, and the average price of \$67, would be \$17. The loss to the plaintiff, therefore, being \$17 per ton, the total amount would be \$13,260. In addition to this, plaintiff would be entitled to recover

the unapplied portion of the deposit money, amounting to \$5200.

Findings will be prepared accordingly, upon which the Clerk will enter judgment.

Dated April 17, 1924.

Wm P James

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District Judge.

[Endorsed]: No. 152 Civil. U. S. District Court, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff. vs. KARL EMERZIAN, Defendant. OPINION. FILED APR 17 1924 CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy

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IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

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|                    |   |                  |
|--------------------|---|------------------|
| S. J. KORNBLUM and | : | No. 152 Civil    |
| WILLIAM KORNBLUM,  | * |                  |
| a corporation,     | : |                  |
| Plaintiff,         | * | NOTICE OF MOTION |
| vs.                | * | FOR NEW TRIAL    |
| KARL EMERZIAN,     | : |                  |
| Defendant.         | * |                  |

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To plaintiff above named and to Edward Schary, Lindsay & Conley and K. A. Miller, its attorneys:

You will please take notice that defendant in the above entitled action intends to move the above entitled court that the judgment and decision heretofore made and entered in said action be set aside and vacated and a new trial of said action be granted.

Said motion will be made upon the following grounds:

1. Irregularity in the proceedings of the court and abuse of discretion by which defendant was prevented from having a fair trial.

2. Accident and surprise which ordinary prudence could not have guarded against.

3. Excessive damages.

4. Insufficiency of the evidence to justify the decision and that it is against law.

5. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon the minutes of the court and upon affidavits to be hereafter served and filed.

Dated this May 12, 1924.

Geo. Cosgrave

L. B. Hayhurst

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Attorneys for Defendant

[Endorsed]: Due service of the within notice admitted and receipt of copy acknowledged this May 12th 1924 Lindsay & Conley & K. A. Miller and Edward Schary Attorneys for Defendant No. 152 Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR

SOUTHERN DISTRICT OF CALIFORNIA  
 Northern Division. S. J. KORNBLUM and WIL-  
 LIAM KORNBLUM, a corporation, Plaintiff, vs.  
 KARL EMERZIAN, Defendant. NOTICE OF MO-  
 TION FOR NEW TRIAL FILED MAY 12 1924  
 Chas. N. Williams, Clerk GEO. COSGRAVE  
 Mattei Bldg. Fresno, Calif. ATTORNEY-AT-LAW

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At a stated term, to-wit: The May Term,  
 A. D. 1923 of the District Court of the United  
 States of America, for the Northern Division of the  
 Southern District of California, held at the Court  
 Room thereof, in the City of Los Angeles, on Monday  
 the Thirtieth day of June, in the year of Our Lord one  
 thousand nine hundred and twenty-four.

Present:

The Honorable Wm P James District Judge.

|                   |   |                      |
|-------------------|---|----------------------|
| S. J. and         | ) |                      |
| William Kornblum, | ) |                      |
| a corporation,    | ) |                      |
|                   | ) |                      |
| Plaintiff         | ) | No. 152 Civil, N. D. |
| vs.               | ) |                      |
| Karl Emerzian,    | ) |                      |
| Defendant         | ) |                      |

This cause coming before the court at this time for  
 hearing on motion for a new trial; W. M. Conley, Esq.,  
 appearing as counsel for the plaintiff; Geo. Cosgrave,  
 Esq., appearing as counsel for the defendant, said Geo.  
 Cosgrave, Esq., argues in furtherance of motion for

new trial and W. M. Conley, Esq., having thereupon argued in opposition thereto, said Geo. Cosgrave, Esq., argues further in reply in support of motion; now, it is by the court ordered that said motion for a new trial be denied and that an exception be noted for the defendant. Order heretofore signed in the matter of time to file Bill of Exceptions.

M E W

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division.

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|                     |   |               |
|---------------------|---|---------------|
| S. J. KORNBLUM and  | : | No. 152 Civil |
| WILLIAM KORNBLUM, * | : |               |
| a corporation,      | : |               |
| Plaintiff, *        | : | ASSIGNMENT OF |
| vs.                 | : | ERRORS        |
| KARL EMERZIAN, *    | : |               |
| Defendant. :        | : |               |

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Comes now defendant above named and files the following statement of errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause, petition for which writ is filed at the same time with this assignment.

1.

The court erred in overruling the objection of coun-

sel for defendant to the following question which was asked of Karl Emerzian, a witness for the plaintiff, upon his examination by counsel for plaintiff pursuant to the provisions of Section 2055 of the Code of Civil Procedure of the State of California:

“Q The 1st to the 10th day of October, what was the reasonable market value of Muscat grapes delivered here in refrigerator cars in Fresno, or I will make it the San Joaquin Valley, at that time?”

A From \$60 to \$75.

Q What were they worth from the 10th day of October until the 20th?

MR. COSGRAVE: We object to that, if the Court please, as being immaterial, at least at this stage of the case. There has been no breach shown at the present time, at least prior to October 26th, and therefore the price of Muscat grapes at a time prior to that is immaterial at this stage of the evidence.

THE COURT: It might be some evidence leading up to it, showing his general familiarity with the market. It might be some evidence.”

Exception.

Q BY MR. CONLEY: .... What was the market value between the 10th and the 20th of October?

A From \$60 to \$75 a ton.

2.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of S. J. Kornblum, a witness for the plaintiff:

“Q. Mr. Kornblum, you have been sitting here lis-



tening to the testimony of Mr. Emerzian. I don't want to ask you any questions about it, but I want you to tell this court what took place in your room upstairs and what led up to it and all that occurred there.

MR. COSGRAVE: If the Court please, it seems to me that that evidence is not material. Evidently there is enough before the Court to show that there has been a written agreement signed between these parties. What led up to that I should think is entirely immaterial. There is nothing in the pleading to warrant the conclusion that it was the result of coercion or anything of that sort. There is no claim made of that kind. Therefore it supersedes whatever written agreement there was before, and also the oral negotiations of the parties.

THE COURT: I suppose anything that occurred between the parties by way of a dispute or a claim for failure and a denial of delivery, and all of those things, must be ventilated here in order to get at the facts of this controversy. Grapes are admitted not to have been delivered in full performance of the contract, and the question is why, and I suppose the only way to get at it is to find out what happened between them during that time.

MR. COSGRAVE: We make the specific objection on the further ground that it appears from the evidence in this case that the negotiations the witness is about to describe resulted in a new contract.

MR. CONLEY. We might call the Court's attention to the fact that it is alleged right in Paragraph VII of the complaint. We have alleged they failed,

refused, and neglected to deliver the other 52 cars, and we want to show why this was done.

THE COURT: Objection overruled.

Exception.

“Q. BY MR. CONLEY: Mr. Kornblum, take your time and state all that you remember that occurred up in that room and how you happened to go up there, and all about it.

A I remember it was on the 18th day of October; in fact I remember it was that date because I see the paper was written on the 18th of October. I came in that night into the lobby and he said, “I got to talk to you and we better come upstairs to your room.” And I did go up with him, and I came in. We were both in the room and he said. ‘You better lock that door. I don’t want no interference. Somebody may come in.’ I says, ‘What is it all about?’ So he said to me, ‘You know you are not going to get 100 cars of grapes’—100 cars of Muscats. I says, ‘I didn’t know that Mr. Emerzian. That is the first time, your telling me.’ I says, ‘Why ain’t I going to get 100 cars of grapes?’ ‘Well’, he says, ‘In the first place you overloaded these cars. You loaded so many more in these cars than I would have given you in ordinary cars.’ I says, ‘According to the contract we have no specifications as to how many you are going to put in the car, and the cars being scarce we want to load them all we can.’ I says, ‘That is to your benefit.’ He says, ‘No, sir. I could get \$1000 more for some of these cars.’ ‘Well,’ I said, ‘you couldn’t get that when I took them at \$40, a thousand dollars more, and you

didn't object to that.' I says, 'Why do we want to quarrel now about that? Give me all you can. Go right on and give me as many as you can, but give me these cars that you are loading somewheres else.' So then I told him, 'Well, all right, I will reduce that 10 cars; I will make it 90 cars from the fact that you overloaded these cars.' 'Oh, no; I will not give you no 90', he says. 'Well,' i says, 'how many do you want to give me?' 'Well,' he says, '60 cars is all I am going to give you. That is 15 more.' So I says, 'Why, that is ridiculous. I can't accept 15 more cars.' I says, 'I can make \$55,000 more and you are just going to rob me out of \$55,000.'" I says, 'I was good enough'—or I reminded him then of the fact that this contract was made without any money at all. The wires that he sent back East to me was that the purchase would be without money, and I told him that.'"

## 3.

The court erred in overruling the objection of counsel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q I will ask you this: did any request come from you at any time to reduce the number of cars?"

MR. COSGRAVE: Objected to as calling for the conclusion of the witness, if the Court please.

THE COURT: He may answer yes or no and then state what was said.

Exception.

A Positively not."

## 4.

The court erred in overruling the objection of coun-

sel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

“Q BY MR. CONLEY: What was the condition of the grapes that you saw they were loading on the car the next day you were there?”

MR. COSGRAVE: Just a moment. I ask that my motion go to all of the evidence of this witness respecting the grapes that he is describing as having been on or about the 29th or 30th of October, for the reason that so far he has not connected a single box of grapes with any that he has received or had tendered to him.

THE COURT: He can testify to what he saw and we will see whether they are connected up as being the same grapes that were tendered to him.

(Exception)

Q BY MR. CONLEY: Just go on.

THE COURT: Just tell what you observed, not your conclusion.

A Yes, your Honor. I observed that the same truck was backed up against the barn, and two or three men put them grapes up from the floor onto the truck. I went away, and then I was in Taylor's packinghouses and I watched and seen that same truck backed up against the car and load these grapes.”

5.

The court erred in overruling the objection of counsel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

“Q I will ask you, Mr. Kornblum, what was the value of Muscat grapes in this valley f.o.b. refriger-

erator cars from the 1st to the 10th of September, 1922, and all of these questions will be the same.

MR. COSGRAVE: We renew our objection to that, if the Court please, on the ground it is incompetent, irrelevant, and immaterial, and I want to make this suggestion, if it is at all material it is on the ground that there was a breach of the contract. No breach has been alleged, as I understand, or even claimed, prior to the 26th of October.

. . . . .

THE COURT: . . . . I will admit the testimony; and I am willing to hear you further, Mr. Cosgrave, on the argument, as to the application of it.

. . . . .

THE COURT: I will admit the testimony showing the whole range of prices during the whole period, and leave it open for you gentlemen to argue further if you care to.

(Exception)

Q BY MR. CONLEY: State the value from the 1st to the 10th of September, 1922.

A The 1st of September there were quotations at \$37.50 a ton f.o.b. refrigerator cars. There might have been just one or two sales, but the general price was \$40 on the 1st of September."

6.

The court erred in overruling the objection of counsel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q You only bought, as I understood your testimony, 48 cars?

A There were delivered 48 cars, but I had to go outside in the market and pay \$85 and \$87.50 to supply my grapes.

MR. COSGRAVE: Just a moment; objected to—

MR. CONLEY: That is what I want, exactly.

MR. COSGRAVE: I desire to object to the evidence and have the objection come before the answer, on the ground it is incompetent, irrelevant, and immaterial, and not the proper measure of damages as to what this defendant had to pay for grapes.

. . . . .

THE COURT: Objection overruled.

(Exception)

Q BY MR. CONLEY: How many cars of Muscat grapes did you buy in Fresno County from the 1st day of September until the season was over, during the year 1922?

A I bought—

MR. COSGRAVE: Let our objection go to all of this testimony.

THE COURT: Yes; and overruled.

A 85 cars.

Q BY MR. CONLEY: Then if my figures are right, in addition to the cars purchased from Emerzian you purchased 37 cars of other Muscat grapes?

A Yes, sir."

7.

The court erred in overruling the objection of counsel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q Why did you make these outside purchases? Did you have any reason for it?

A Because I couldn't get them from Emerzian.

MR. COSGRAVE: Just a moment. Our contention is that the measure of damages in this case does not depend on whether this plaintiff went and bought grapes or not.

THE COURT: It is not offered for that purpose. It is a circumstance, only, as tending, if it does, to contradict the witness who has testified in regard to what this witness stated to him.

MR. COSGRAVE: I suggest, if your Honor please, that evidence of this kind might be material on the cross-examination of the defendant, but not in support of or proof of a fact from which an inference can be drawn that he did or did not do a certain thing. It is purely self-serving, so far as the plaintiff is concerned, to show that he went and did a certain thing, and to say that because of that it is probable that the defendant himself was not telling the truth on the witness stand. That is what it means, and I suggest evidence of that kind is entirely irrelevant and immaterial.

THE COURT: I will permit it; overruled.

(Exception)

A I sold grapes on the strength of this contract.

MR. COSGRAVE: And we object on the further ground, if the Court will allow me to do so, that there is no pleading here that these grapes were purchased for any special purpose, and it certainly is the rule of law that in the absence of such an allegation no evidence of this kind is admissible."

The court erred in overruling the objection of coun-

sel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

“Q BY MR. CONLEY: After you entered into this contract with Emerzian for the delivery of those 100 cars, did you or did you not enter into contracts with people in the East to deliver them Muscatel or Muscat grapes?”

MR. COSGRAVE: We object to that on the ground it is incompetent, irrelevant, and immaterial, and not a proper element of damages in this case, and not within the issues made by the pleadings.

THE COURT: Yes; it is not admitted for the purpose of showing damage, and it is overruled otherwise.

(Exception)

Q BY MR. CONLEY: You may answer the question.

A Yes, sir; I entered into agreements to deliver grapes on the strength of the contract that I knew I had 100 cars, and that I was going to get them when I was told.

MR. COSGRAVE: And we object on the further ground, if the Court please, that evidently this was in writing and the contracts themselves are the best evidence.

THE COURT: Objection overruled.”

(Exception.)

9.

The court erred in overruling the objection of counsel for the defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:



“Q Mr. Kornblum, I will ask you, after the 18th day of October, 1922, until the 26th day of October, 1922, whether or not you purchased any cars of Muscat grapes from persons other than the defendant in this action.

MR. COSGRAVE: We object to that as incompetent, irrelevant, and immaterial.

THE COURT: The same ruling. It is not admitted for the purpose of establishing damage, but is admitted for other purposes. Overruled.

(Exception)

A Yes; I bought all I could get.

Q BY MR CONLEY: How many did you get?

A About 20 to 22 cars.

Q What price did you pay for them?

A I paid up to \$87.50. I bought them as low as I could. I bought some at \$85, and around \$87.50. That is the highest price I paid.

Q And what was the purpose of making those purchases?

A To fill my contracts.

MR. COSGRAVE: Of course our objection goes to all of this line of testimony.

THE COURT: The same ruling.”

(Exception)

10.

The court erred in overruling the objection of counsel for the defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

“MR. CONLEY: . . . . For the purpose of

enabling the Court to determine the capacity of the cars, we offer as one exhibit all of the manifests that were furnished by the defendant to the plaintiff in the action, and for that purpose only.

MR. HAYHURST: To which we object, if the Court please, on the ground it is immaterial, irrelevant, and incompetent. The mere fact that the cars were loaded in some instances to 15 or 16 tons is no indication of what was the intention of the parties. We think that "a carload" has a meaning that we can show the meaning of the parties by the custom of shippers, and that the railroad company, except in times of extreme car shortage, fixed a capacity to those cars of 12 tons.

THE COURT: Isn't it an indication of what the parties intended by considering what they actually did as far as they went?

Mr. Hayhurst: I suppose that is what it is offered for.

THE COURT: That is a common rule of interpretation, when the parties under a contract have proceeded in a certain way, that that is evidence of what was intended to be done.

MR. HAYHURST: I recognize that rule, your Honor, but I still make the objection.

MR. COSGRAVE: If the Court please, there is an additional element in this: The Court will realize that very shortly or a considerable time after this contract was made and about the time this shipment began there was a very acute shortage of cars, and we expect to show that the parties loaded them to utmost capacity at that time.

THE COURT: That of course might be subject to variation by evidence that you might have to offer. The objection will be overruled."

(Exception).

11.

The court erred in sustaining the objection of counsel for plaintiff to the following question which was asked of S. J. Kornblum, a witness for plaintiff, upon cross-examination:

"Q I say, if they are used for wine purposes they are crushed immediately, aren't they?

MR. CONLEY: We don't desire to make any captious objections, but it seems to me that is argumentative.

THE COURT: Yes; in view of the witness's answer that he had no such knowledge. I will sustain the objection."

(Exception)

12.

The court erred in sustaining the objection of counsel for plaintiff to the following question which was asked of S. J. Kornblum, a witness for plaintiff, upon cross-examination:

"Q Were you here during the past season of 1923?

A Yes, sir.

MR. CONLEY: One moment; if your Honor please, I object to all of this line of testimony, and base the objection upon the allegations of Paragraph II of their answer, and call your Honor's attention to the wording of it.

THE COURT: I will sustain the objection."

(Exception)

13.

The court erred in sustaining the objection of counsel for plaintiff to the following question which was asked of S. J. Kornblum, a witness for plaintiff, upon cross-examination:

“Q To whom else, other than to Charles Emerzian, the nephew, did you tell that this contract had been extorted from you?”

MR. MILLER: What difference does that make? We object to it.

MR. COSGRAVE: I think it is very important to show whether it came at his suggestion or Karl Emerzian’s suggestion.

MR. MILLER: It wouldn’t reflect the transaction between the parties. It is immaterial.

THE COURT: I will sustain the objection.”

(Exception)

14.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of S. J. Kornblum, a witness for plaintiff, upon re-direct examination:

“Q Did you see any grapes that were fit for shipment to the Eastern markets after that date?”

A No, sir.

MR. HAYHURST: That is objected to on the same ground.

THE COURT: Overruled.

. . . .

MR. COSGRAVE: We desire an exception to the rulings, if your Honor please.”

(Exception)

15.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of Walter Bonnett, a witness for plaintiff, upon direct examination:

“Q BY MR. CONLEY: Refer to your records and tell us what the precipitation was in the months of September and October, 1922.

A In the month of September there was no rain at all at Fresno. In the month of October, on the first day, there was a trace, that is, an amount too small to measure, or at least less than one-hundredth of an inch. On the 2nd day of October there was .01 of an inch. There was no rain then until the 27th, when there was .51. That is all the rain in October.

A What was the precipitation here in the month of November, the first ten days of November?

MR. HAYHURST: Do our objections, if the Court please, and exceptions, go to all of this testimony?

THE COURT: It may be shown.

MR. HAYHURST: We would like the record to show our objections and exceptions to the ruling if the ruling is to be the same.

THE COURT: It is understood that you object to all evidence as to the rainfall for September, October, and November, 1922.

MR. HAYHURST: Yes, sir.

THE COURT: And the objection is overruled and you may have your exception.

(Exception)

“Q BY MR. CONLEY: What was it for the first ten days in November?”

A On the 2nd day of November there was a trace; no rain then until the 7th, when there was .12. On the 8th, .09; on the 9th, .29, and on the 10th, .11.”

16.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of F. M. Withers, a witness for plaintiff, upon re-direct examination:

“Q What was the price of Muscat grapes from the 1st of September until the 1st of October?”

MR. COSGRAVE: We renew our objection to this line of testimony on the same grounds heretofore urged.

THE COURT: Yes; and the objection is overruled.

MR. COSGRAVE: And we take the same exception.

Q BY MR. MILLER: F. O. B. Fresno.

A From the 1st of September to the 1st of October the market started out on Muscats for the season, which is practically the 1st of September, around \$37.50 a ton f.o.b. cars, and remained stationary for about a week, from \$37.50 to \$40. Then the market started to climb, and around the 1st of October the market was in the neighborhood of \$60 to \$65, a ton, as I recall.

Q From the 1st of October until the 18th of October what did it get to?

A The market kept on climbing on all varieties of grapes which included Muscats, and around the 18th of October the market was very strong, at \$85 a ton.

Q What was the highest it got during the season?

A I heard of some sales higher than \$85, but I didn't make any myself, so \$85 is what I would want to base my figure on."

17.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of E. Y. Foley, a witness for plaintiff, upon direct examination:

"Q Mr. Foley, will you state to the Court what the value of Muscat grapes per ton was from the first day of September until about the tenth day of September, 1922?

.....

MR. COSGRAVE: We object, of course, to this line of evidence upon the grounds stated yesterday, that is, that it is incompetent, irrelevant and immaterial and not tending to establish a proper measure of damages in this action.

THE COURT: Objection overruled.

(Exception)

.....

A We started selling Muscat grapes in the early part of August forty to forty five dollars a ton. On the 25th of August we sold them at \$52.50 a ton. On the 27th of August we sold at \$60.00 a ton. On the 29th of August we sold at \$62.50 a ton, and the market from the first of August ranged from \$62.50 to \$72.50 a ton.

MR. CONLEY: You mean September, don't you?

A From the first of September to the 25th of September.

Q You used the term "August."

A I meant September. We did not sell any, however, at \$72.50 a ton until the 23rd of September. From that on we sold up to the third of October at \$80.00. From the 3rd to the 6th we got \$85.00 and I sold a car on the 13th for \$100.00 and that was the last sale we made on Muscats."

18.

The court erred in denying defendant's application for leave to amend its pleadings by pleading as a defense to plaintiff's action the shortage of cars existing during the season of 1922, said error occurring as follows:

"Q Do you know generally to what extent or what percentage of contracts such as yours were filled in Fresno County?

MR. CONLEY: We object on the ground it is incompetent, irrelevant and immaterial.

THE COURT: Do you mean by that what percentage of cars did you get to meet the demand?

MR. COSGRAVE: Yes; that is it.

A 25%.

MR. MILLER: May we offer another objection? The pleadings here allege they were able and willing to furnish these cars, and what difference does it make?

THE COURT: I will sustain the objection.

MR. COSGRAVE: . . . . It is my understanding, if Your Honor please, that at the time this



answer was drawn that in the first place there would be no question about the change to the 52 cars, but they charge us with a refusal to deliver. We allege that we did not refuse to deliver and I think we are within our rights in showing that we did not refuse to deliver because of this arrangement that was made, or because of the shortage of cars, because that is one of the provisions of the contract 'subject to shortage of cars.' . . . . . if there is any question about this we would have to suggest an amendment to our answer so as to cover the point . . . . .

. . . . .

THE COURT: I think, Mr. Cosgrave, that your allegation in Paragraph III, where you allege in terms a refusal of the plaintiff to receive any car than the 48 cars is to be construed as being the only excuse that you have for not delivering, that he refused to receive them.

MR. COSGRAVE: That is what I wanted to get at. If that is the view of the Court I would suggest that we will ask leave to make an amendment to it so as to offer on that proposition that there was a shortage of cars . . . . .

. . . . .

THE COURT: Coming at this time it is too late to permit an amendment to raise an issue which would be entirely new to the case and in the midst of the trial, and I think the only way discretion could be exercised without abusing it would be to deny the application, and it is so ordered."

19.

The court erred in awarding judgment to plaintiff.

Dated: July 8, 1924.

L. B. Hayhurst and Geo. Cosgrave

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Attorneys for Defendant

[Endorsed]: Due service of the within Assignment of Errors admitted and receipt of a copy acknowledged this July 9th, 1924. Edward Schary Attorneys for Plaintiff No. 152-Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. ASSIGNMENT OF ERRORS FILED JUL 14 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk GEO. COSGRAVE MATTEI BLDG FRESNO, CALIF. ATTORNEY-AT-LAW

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division.

\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*

S. J. KORNBLUM and : No. 152 Civil
WILLIAM KORNBLUM, \*
a corporation, :
Plaintiff, \* PETITION FOR
vs. : WRIT OF ERROR
KARL EMERZIAN, \*
Defendant. :

\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*

Karl Emerzian, the defendant in the above entitled cause, feeling himself aggrieved by judgment entered in the above entitled action on May 5, 1924, and new trial of which cause was heretofore denied on June 30, 1924, comes now by his attorneys, Geo. Cosgrave and L. B. Hayhurst, and files herewith an assignment of error and petitions said court to allow said defendant to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which defendant shall give and furnish upon said writ of error and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error

by the United States Circuit Court of Appeals for the Ninth Circuit.

L. B. Hayhurst

Geo. Cosgrave

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Attorneys for defendant

[Endorsed]: Due service of the within Petition for Writ of Error admitted and receipt of a copy acknowledged this July 9th, 1924. Edward Schary Attorneys for Plaintiff No. 152 - Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. PETITION FOR WRIT OF ERROR FILED JUL 14 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk GEO COSGRAVE MATTEI BLDG. FRESNO, CALIF. ATTORNEY-AT-LAW For defendant

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division.

\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*

S. J. KORNBLUM and : No. 152 Civil
WILLIAM KORNBLUM, \*
a corporation, :
Plaintiff, \* ORDER ALLOWING
vs. : WRIT OF ERROR
KARL EMERZIAN, \*
Defendant. :

\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*

Upon motion of Geo. Cosgrave and L. B. Hayhurst, attorneys for defendant and upon filing a petition for a writ of error and assignment of errors,

IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein.

Dated: July 14, 1924.

Wm P James
Judge.

[Endorsed]: No. 152 - Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. ORDER ALLOW-



of Appeals for the Ninth Circuit to reverse said judgment of said District Court of the United States in said cause and to file said writ of error, when obtained, in the Clerk's office of said court, and to apply for the issuance of a citation on said writ of error directed to said plaintiff in said cause citing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City and County of San Francisco, in the State of California, according to law, within thirty (30) days from the date of citation; and

WHEREAS, the said appellant is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, we the undersigned, KARL EMERZIAN, as principal, and RICHARD EMERZIAN and CHARLES EMERZIAN, as sureties, in consideration thereof, and of the premises, undertake and promise and do acknowledge ourselves, and each of us and our and each of our successors and assigns, held and firmly bound unto the plaintiff herein, its successors and assigns, jointly and severally, and undertake and promise in the sum of \$25,000.00, Gold Coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay in United States Gold Coin to the said plaintiff, its successors or assigns, the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant herein upon such appeal; and if the appellant does not make such payment

within thirty (30) days after the said judgment becomes final, in the court from which the appeal is taken, judgment will be entered on motion of the respondent, in its favor, and against the undersigned sureties, for the said amount of said judgment, together with interest which may be due thereon and the damages and costs, which may be awarded to the appellant upon the appeal.

Karl Emerzian

---

Principal  
Richard Emerzian

---

Charles Emerzian

---

Sureties

STATE OF CALIFORNIA    )  
                                          ( SS.  
County of Fresno.         )

RICHARD EMERZIAN and CHARLES EMERZIAN, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says: I am a resident and freeholder in said state and am worth the sum of Twenty-five Thousand Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

Charles Emerzian

---

Richard Emerzian

---



Subscribed and sworn to before me  
this July 10, 1924.

James T. Barstow (Seal)

---

Notary public in and for said county and state

The above and foregoing bond upon writ of error  
is hereby approved and the same shall operate as a  
supersedeas.

Dated this 14 day of July, 1924.

Wm P James

---

United States District Judge

Kornblum v. Emerzian, No. 152-Civil

Hon. W. P. James,

United States District Judge:—

The supersedeas bond filed on behalf of Karl  
Emerzian in the above entitled action, with Richard  
Emerzian and Charles Emerzian, as sureties, is satis-  
factory to plaintiff.

Dated: July 9, 1924.

Lindsay & Conley  
K. A. Miller and  
Edward Schary

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Attorneys for Plaintiff

[Endorsed]: No. 152-Civil IN THE DISTRICT  
COURT OF THE UNITED STATES IN AND FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA  
Northern Division. S. J. KORNBLUM and WIL-  
LIAM KORNBLUM, a corporation, Plaintiff, vs.

KARL EMERZIAN Defendant. SUPERSEDEAS  
 BOND ON WRIT OF ERROR FILED JUL 14  
 1924 CHAS. N. WILLIAMS, Clerk By R S Zim-  
 merman Deputy Clerk GEO. COSGRAVE Mattei  
 Bldg. Fresno, Calif. ATTORNEY-AT-LAW For de-  
 fendant

IN THE DISTRICT COURT OF THE UNITED  
 STATES, FOR THE SOUTHERN DISTRICT  
 OF CALIFORNIA  
 Northern Division

S. J. KORNBLUM and ) No. 152 Civil  
 WILLIAM KORNBLUM,(  
 a corporation, )AMENDED PRAECIPE  
 Plaintiff, ( FOR CERTIFIED  
 vs. ) COPY OF TRAN-  
 KARL EMERZIAN, ( SCRIPT OF RECORD  
 Defendant. ) ON WRIT OF ERROR.  
 \*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*\_\_\*

To the Clerk of said Court:

Sir: Please issue a certified Transcript of the  
 Record on Writ of Error in the above-entitled case,  
 to consist of the following papers, to-wit:

Citation on Writ of Error

Writ of Error

Amended Complaint

Answer to Amended Complaint, Counter-claim and  
 Cross complaint

Answer to Counter-Claim and Cross Complaint

Findings of Fact and Conclusions of Law

Judgment

Bill of Exceptions

Opinion

Notice of Motion for New Trial

Order Denying Motion for New Trial

Assignment of Error

Petition for Writ of Error

Order Allowing Writ of Error

Supersedeas Bond on Writ of Error

Amended Praecipe.

Dated: October 20, 1924.

Geo. Cosgrave and L. B. Hayhurst

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Attorneys for Defendant and  
Plaintiff in Error

[Endorsed]: No. 152 Civil IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM etc. Plaintiff, vs KARL EMERZIAN, Defendant. AMENDED PRAECIPE FOR CERTIFIED COPY OF TRANSCRIPT OF RECORD ON WRIT OF ERROR. FILED OCT. 21 1924 CHAS. N. WILLIAMS, Clerk By L. J. Cordes Deputy Clerk GEO. COSGRAVE Mattei Bldg Fresno, Calif. ATTORNEY-AT-LAW.

IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA  
NORTHERN DIVISION

\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*

S. J. KORNBLUM and )

WILLIAM KORNBLUM, )

a corporation, )

Plaintiff, )

vs. )

KARL EMERZIAN, )

Defendant. )

\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*\_\*

## CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 147 pages, numbered from 1 to 147 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff-in-error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, amended complaint, answer to amended complaint, counter-claim, cross-complaint, answer to counter-claim and cross-complaint, findings of fact and conclusions of law, judgment, bill of exceptions, opinion, notice of motion for new trial, order denying motion, assignment of errors, petition for writ of error, order allowing writ of error, supersedeas bond and amended praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this                    day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-four, and of our Independence the One Hundred and Forty-ninth.

CHAS. N. WILLIAMS,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District  
of California.

By

Deputy.

1870  
The following is a list of the names of the persons who have been admitted to the membership of the Society since the last meeting of the Council.

Mr. J. H. [Name] of [Location]  
Mr. W. B. [Name] of [Location]  
Mr. C. D. [Name] of [Location]  
Mr. E. F. [Name] of [Location]  
Mr. G. H. [Name] of [Location]  
Mr. I. J. [Name] of [Location]  
Mr. K. L. [Name] of [Location]  
Mr. M. N. [Name] of [Location]  
Mr. O. P. [Name] of [Location]  
Mr. Q. R. [Name] of [Location]  
Mr. S. T. [Name] of [Location]  
Mr. U. V. [Name] of [Location]  
Mr. W. X. [Name] of [Location]  
Mr. Y. Z. [Name] of [Location]

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Mr. G. H. [Name] of [Location]  
Mr. I. J. [Name] of [Location]  
Mr. K. L. [Name] of [Location]  
Mr. M. N. [Name] of [Location]  
Mr. O. P. [Name] of [Location]  
Mr. Q. R. [Name] of [Location]  
Mr. S. T. [Name] of [Location]  
Mr. U. V. [Name] of [Location]  
Mr. W. X. [Name] of [Location]  
Mr. Y. Z. [Name] of [Location]